DOCKET

No. 88-1203-CFX
Status: GRANTED

Title: Hoffmann-La Roche, Inc., Petitioner
v.
Richard Sperling, et al.

Docketed:
January 20, 1989

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Ridley,John A.

Counsel for respondent: Becker,Ben H., Flamm,Leonard N.

Entry	Date	Note	Proceedings and Orders
1	Jan 20 1989	G	Petition for writ of certiorari filed.
3	Feb 21 1989	X	Brief of respondents in opposition filed.
2	Feb 22 1989		DISTRIBUTED. March 17, 1989
4	Mar 20 1989		Petition GRANTED.
			**********
6	Apr 19 1989		Order extending time to file brief of respondent on the merits until May 18, 1989.
7	Apr 27 1989		Record filed.
		*	Certified copy of 2 volumes of appendices, briefs and partial proceedings received. (Box).
9	May 18 1989		Brief amicus curiae of Equal Employment Advisory Council filed.
10	May 18 1989		Brief of petitioner Hoffman-La Roche, Inc. filed.
11	May 18 1989		Joint appendix filed.
8	May 19 1989		Record filed.
		*	Certified copy of original record received.
13	Jun 2 1989		Order extending time to file brief of respondent on the merits until July 7, 1989.
14	Jul 7 1989		Brief of respondents Richard Sperling, et al. filed.
15	Jul 7 1989		Brief amicus curiae of American Assn. of Retired Persons filed.
16	Jul 7 1989		Brief amicus curiae of Equal Employment Opportunity Commission filed.
17	Jul 13 1989		CIRCULATED.
19	Jul 20 1989		SET FOR ARGUMENT MONDAY, OCTOBER 2, 1989. (3RD CASE)
20	Aug 4 1989	X	Reply brief of petitioner Hoffman-La Roche, Inc. filed.
21	Oct 2 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

88-1803

In The

Supreme Court of the United States

October Term, 1988

HOFFMANN-LA ROCHE INC.,

Petitioner,

vs.

RICHARD SPERLING, FREDERICK HEMSLEY AND JOSEPH ZELAUSKAS, Individually, and on behalf of all other persons similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOHN A. RIDLEY
One Gateway Center
Newark, New Jersey 07102-5311
(201) 622-2235

Counsel of Record

Of Counsel:

HAROLD F. BOARDMAN, JR.,
General Counsel
EUGENE V. DeFELICE,
Law Department
Hoffmann-La Roche Inc.
340 Kingsland Street
Nutley, New Jersey 07110
(201) 235-5000

RICHARD S. ZACKIN
ANN G. McCORMICK
MICHAEL P. HICKEY
CRUMMY, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE
A Professional Corporation
One Gateway Center
Newark, New Jersey 07102-5311
(201) 622-2235

Counsel for Petitioner

January 19, 1989

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QUESTION PRESENTED

In a case brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, where the joinder in the action of persons other than the named plaintiffs is governed by 29 U.S.C. § 216(b), does the district court possess the authority to authorize and facilitate notice of the action to said persons who have not yet filed consents to join the action?

LIST OF PARTIES

The caption set forth on the cover page to this petition sets forth all of the named parties to this proceeding. In addition to the three named plaintiffs, 408 persons have opted into the lawsuit by virtue of the filing of "Consents to Join Action." The names of all plaintiffs are as follows:

F. Virginia Adams
Samuel W. Addeo
Richard S. Albrecht
Edward A. Alexander
Willie Alston
Balwant A. Ambekar
David A. Andrews
Raymond Antelman
Thomas Anton
Edward K. Archdeacon
Louis Arthur
Michael Aryento
Edwin J. Auerbach
Helen A. Ax
James Axam
John R. Baldwin
Bela I. Balogh
Robert D. Bannon
John E. Barbee, Jr.
Constance J. Barone
F. Paul Barone
Thomas Beardsmore
Fredric W. Berdux
Anne C. Biedenweg
Edward J. Bill
Maryann Blauner
Herbert C. Blum
Edward Boff
Song H. Bok
Matthew Bonnefond
William R. Bouton
Mary L. Boyd
Charles M. Brahin
Anthony J. Brancaccio
Werner P. Brodde
Robert B. Brownfield
Anne V. Bukowski
Carmella M. Bunucci
Myron M. Bychek
Jose A. Cabrera
Joseph F. Caffrey
John Calefato
Velma Candia
John J. Cannaveno
Angelo Capalbo
Alfred B. Capomaggi
Mary Ann Carissimo
Oranzo Centrone
Shih-Pan Chang
Alex Chelak
Quido Chiarelli
Donald F. Chisholm
Martin B. Chmura
Kenneth Chucta

Sylvester V. Ciancitto
Nadia Ciolko
Dorothy C. Cleary
Norman Cohen
John Colella
Jaime P. Colmenares
William J. Conradi
Alan F. Cook
William Cooper
Winifred M. Cori
Angela M. Cozzarelli
Ralph R. Crawford
Esther C. Critelli
Ellen Crosby
Castor L. Cruz
Wiktor W. Dabrowski
Abbas Dahodwala
Philip J. Daly
Norman E. Damron
James Darrah
Theodore Dashman
Clarence Daubert
Richard C. Davies
Eliel W. Davis
Patsy DeBlasio
Janina Dec
Dante V. DeFlorio
Josben Dela Rosa
William F. DeLorenzo
Peter H. DePaolo
Fred P. DeStefano
Cornelius Johannes de Voogt
Charles DeWitt
Edward DeZabala
Joseph Dispoto
Edith Dlugokencki
Margaret Dluhy
David H. Dorbandt
Harvey R. Dorpfeld, Jr.
Norman Douglass
Richard M. Downey
Bernd O. Eckholt
George W. Edwards
Garry G. Eichmann
Albert H. Ellis
Terrell L. Elrod
George Ember
Richard Epps
Edward T. Esposito, Sr.
Robert P. Eswein
Michael H. Fahy
Richard E. Faust
Jane M. Flanders
Emma Forino
Fedor Frenkl
Rodney I. Fryer
Geraldine Fullman
Edda Gabriel
Marilyn Gallo
Reynold M. Garcia
Carl R. Gardner
John N. Gardner
William E. Gardner
John K. Garvey
Zane N. Gaut
Lawrence A. George
Alex G. Georgiadis
Bruce R. Glenn
Marie M. Gower
William Grimaldi

Joseph M. Guastella
Martin Hackman
Joseph G. Hamway
Barbara Hansford
Harold Hansford
Edythe P. Hargroves
Clifford L. Harvey
Robert Hazecamp
Farrell M. Hefner
Robert L. Helfrich
Frederick H. Hemsley
Fred Hendricks
Janice E. Hess
Richard C. Hetzel
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Celia A. Hines
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William C. Holt
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Donald C. Hoppe
Raymond Horvat
Arthur J. Huneke, Jr.
Gerald J. Iacouzzi
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Abraham Jacoby
Gerald Janesak
Tessie Jaskiewicz
Philip L. Johnson
William R. Johnston
Elmer B. Jones
Burney C. Jones
Samuel M. Jones
Arlene F. Kaiser
Walter Kaminsky

Bernice Kane
Stanley V. Kasparek
Margaret Kearns
Richard Kearns
Gerard P. Kelly
Peter P. Kelley
Francis King
Josephine Klukowicz
Josef Kochling
John Kominiak
Duane A. Kotsen
Bernard Krebbers
John Krupey, Jr.
Aldred Kuehn
Wolfgang A. Kuenzig
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Joel Lankes
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Anthony G. Liantonio
Louis D. Lichtenberg
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S. Liepiens
Norma Linzalone
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Alice Menyharth
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Herbert R. Moeller
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Stephen A. Moros
William T. Morris
James C. Morrison
Dr. Ralph Mostillo
George M. Murphy
Sime Mustac
Bruce J. Myer
Walter A. Neumann
Wendell H. Niemann
Robert Y. Ning
Robert D. Nosal
Robert A. O'Brien
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Robert L. Parry
Jean Pasek
Beverly A. Pawson
Chiara Payne
Clark W. Perry
Robert E. Peterson
Robert Peyser
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Foster L. Pigott
Alfred A. Pilarz
E. Lee Piver, Jr.
Seymour Plonsky
Gerald A. Pocock
Joseph Polgar
John Porta
Carmella Purciello
Albino Quiam
Leon E. Rajkowski
Elvira Reilly
George J. Reilly, Jr.
George M. Reiser
Helen A. Rennie
Robert Rentsch
James R. Reynolds
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William J. Riley
Margaret Rimested
Ronald D. Robbins
Melline G. Roberts
Roland A. Roe
Frank J. Rogers
Peter W. Rogers
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Matteo Rubinaccio
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Gabriel G. Saucy
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James P. Scannell
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Dr. Monte L. Scheinbaum
Alexander Schlosser
Herbert Schweinberg
Robert A. Schmidt
Betty Schrage
Herbert Schweinberg
Robert M. Schweininger
John A. Seefranz
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Audrey B. Sisco
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Terrence A. Smart
Benjamin Smith
Susan Smitten

Louis Snead
Sebastian P. Spagnuolo
John Spagnuolo
Carlos L. Spears
Richard Sperling
Herbert Spiegel
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Florence Weiss
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Chyi-Fei Yu
Raymond L. Zachmann

Ronald Zambrano
A. Lance Zaremba
Evelyn Zavatsky
Joseph J. Zdrodowski
Joseph Zelauskas
Seymour Zolty

RULE 28.1 LIST

Hoffmann-La Roche Inc. is a wholly owned subsidiary of Roche Holdings Inc., a Delaware corporation. Roche Holdings Inc. is ultimately wholly owned by F. Hoffmann-La Roche & Co., Ltd., Basle, Switzerland (Roche Basle). The voting and non-voting shares of the stock of Roche Basle are inseparably linked with shares of the stock of Sapac Corporation, Ltd., New Brunswick, Canada (Sapac). Shares of Roche Basle stock are traded over the counter in Basle, Geneva and Zurich, Switzerland. There are numerous companies worldwide which are part of this Roche Group, most of which are wholly-owned subsidiaries. The companies in the Roche Group in which Roche has a majority interest, but which are not wholly owned by Roche, are located primarily in Africa and Asia.

Hoffmann-La Roche Inc. has only one subsidiary which is subject to its control, other than wholly owned subsidiaries. It has a majority interest in Columbus Pathology Laboratory, Inc., 306 Hospital Drive, Columbus, Mississippi.

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No.

In The

Supreme Court of the United States

October Term, 1988

HOFFMANN-LA ROCHE INC.,

Petitioner,

v.

RICHARD SPERLING, FREDERICK HEMSLEY AND JOSEPH ZELAUSKAS, Individually, and on behalf of all other persons similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Hoffmann-La Roche Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on November 30, 1988.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Third Circuit, 862 F.2d 439 (3d Cir. 1988), and the United States District Court for the District of New Jersey, 118 F.R.D. 392 (D.N.J. 1988), appear in the Appendix hereto.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on November 30, 1988. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

1. Section 16(b) of the Fair Labor Standards Act (FLSA), codified at 29 U.S.C § 216(b), provides as follows:

> **§ 216. Penalties; civil and criminal liability; injunction proceedings terminating right of action; waiver of claims; actions by Secretary of Labor; limitation of actions; savings provision**
>
> * * *
>
> (b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall

> be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

2. Section 7(b) of the Age Discrimination in Employment Act, codified at 29 U.S.C. § 626(b), provides as follows:

> **§ 626. Recordkeeping, investigation, and enforcement**
>
> * * *
>
> **(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion**
>
> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts

> deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

STATEMENT OF THE CASE

On February 4, 1985 the Petitioner, Hoffmann-La Roche Inc. ("Roche"), implemented a reduction in force in which approximately 1,200 employees were terminated or demoted. Shortly thereafter, a group of the affected employees, with the assistance of counsel, formed a group known as R.A.D.A.R. (Roche Age Discriminatees Asking Redress). A letter, dated March 7, 1985, was drafted by R.A.D.A.R. and its counsel and sent to approximately 600 former employees. The letter advised the former employees that an action would be brought alleging age discrimination and solicited written consents to join the action as plaintiffs. To date, over 400 consents to join the action have been filed with the district court.[1]

On May 7, 1985, a complaint was filed asserting, *inter alia*, age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"). On August 13, 1985, plaintiffs moved for a court-authorized direct mail notice to all persons potentially similarly situated who had not yet filed written consents to join the action. Roche opposed that motion

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1. These facts have been excerpted from the Third Circuit opinion. *See* App. A at 4a. Although not relevant to this petition, Roche takes issue with certain of the factual premises in the Third Circuit opinion.

and cross-moved to vacate the "consents," to dismiss the opt-in claims without prejudice, and for corrective notice as to those persons who already had filed "consents."

On January 5, 1988, the district court filed an Opinion and an Order which granted, in substantial part, plaintiffs' motion for court-authorized notice and denied Roche's cross-motion to vacate the "consents" previously filed and for corrective notice.[2] 118 F.R.D. at 415, App. C at 105a.

On January 19, 1988, Roche filed a motion seeking an amendment of the district court's order of January 5, 1988 certifying for appeal, pursuant to 28 U.S.C. § 1292(b), the issues arising out of the court's granting of plaintiffs' motion for court-authorized notice to potential opt-in plaintiffs and the denial of Roche's cross-motion to invalidate the prior consents and for corrective notice to plaintiffs who already had filed "consents" to join the action. By Order dated January 25, 1988, the district court denied Roche's motion as to the issue regarding the vacation of the "consents" already filed and corrective notice, but granted Roche's motion to certify for appeal, pursuant to 28 U.S.C. § 1292(b), the following question:

> In this case brought pursuant to the Age Discrimination in Employment Act, 28 U.S.C. § 621 *et seq.*, where the joinder in the action of persons other than the named plaintiffs is governed by 29 U.S.C. § 216(b), does the District Court possess the authority to facilitate notice of the action to said persons who have not yet filed consents to join the action?

App. B at 39a-41a.

2. Initially, the district court (per the Honorable Clarkson S. Fisher), referred the motions to the Magistrate under 28 U.S.C. § 636. After the Magistrate issued his report and recommendation, the district court (per the Honorable Harold A. Ackerman) remanded the matter to the Magistrate for further consideration, On May 5, 1987, the Magistrate filed a supplemental report and recommendation whereupon plaintiffs moved for de novo review in the district court.

On March 2, 1988, the Third Circuit Court of Appeals granted Roche's petition for leave to appeal this question.[3] In an Opinion filed on November 30, 1988, the Third Circuit affirmed the district court Opinion holding "that the district court does have the power to authorize notice to be sent to plaintiffs in an opt-in class filed under the Age Discrimination in Employment Act and to review the content of such notice before it is communicated to the [putative] class members." App. A at 20a.

On December 20, 1989, Roche filed a motion seeking to stay the issuance of the mandate of the Third Circuit for 30 days. This motion was granted by Order entered on December 27, 1988 (per Sloviter, J.).

3. Although the district court had declined to certify for appeal the issue of the validity of the consents to join the action previously filed, Roche sought to appeal this issue by (1) filing a petition for a writ of mandamus and (2) filing an appeal under the collateral order rule. The court of appeals denied the mandamus petition on March 2, 1988. The appeal under the collateral order rule was consolidated with the appeal on the certified question for purposes of briefing and argument. In its Opinion filed on November 30, 1988, the court of appeals held that it did not have jurisdiction under the collateral order rule. *See* App. A at 6a-10a. On December 21, 1988 Roche filed a petition for rehearing on this issue, which was denied by Order dated January 9, 1989.

REASONS FOR GRANTING THE WRIT

I.

The decision below deepens the already existing conflict, now among seven Circuit Courts of Appeals, regarding whether it is appropriate for a district court, in actions governed by 29 U.S.C. § 216(b), to authorize and facilitate notice, soliciting joinder, to persons who are not parties to the action.

Section 7(b) of the ADEA, 29 U.S.C. § 626(b), incorporates by reference Section 16(b) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b) (hereinafter referred to as "Section 216(b)"), which empowers the district court to adjudicate only the claims of named plaintiffs and those persons who file consents to join the action (*i.e.*, opt-in). In relevant part, Section 216(b) provides as follows:

> An action . . . may be maintained . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. *No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought* . . . . (Emphasis added)

It is apparent, and all circuits agree, that Section 216(b) does not expressly empower courts to authorize notice to solicit the joinder of potential "opt-ins." Whether district courts, given the lack of express legislative authorization, nonetheless have the power to authorize or facilitate such notice has been the subject of significant and long-standing controversy among the federal circuits—the result being, after more than a decade of judicial scrutiny, a myriad of differing and often diametrically opposed

decisions. Rarely, if ever, has this Court been presented with such an array of decisions evidencing the inability of the federal judiciary to achieve consensus on an important issue of federal law.

The Ninth Circuit was the first appellate court to address the issue of notice under Section 216(b). It did so in the context of an action under the FLSA, although the statute's application to ADEA actions was noted. *See Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859, 862 (9th Cir. 1977).

After analyzing the distinctions between Rule 23 of the Federal Rules of Civil Procedure ("Rule 23") and Section 216(b), the *Kinney* court noted the absence of any legislative authorization for notice in a Section 216(b) proceeding, as well as the absence of any due process concerns, because only those persons who opted-in would be bound by any judgment or settlement. *Id.* at 862-64. Ruling that notice, by whomever sent, was not appropriate, the appellate court reversed the district court's order permitting the circulation by plaintiffs of notice and "consent-to-join" forms to potential opt-ins. The court also concluded that discovery of the names and addresses of potential plaintiffs would be improper if for the sole purpose of circulating notice.[4] *Id.* at 864.

Approximately one year later, the Second Circuit, in *Braunstein v. Eastern Photographic Laboratories, Inc.*, 600 F.2d 335 (2d Cir. 1978) (per curiam), *cert. denied*, 441 U.S. 944 (1979), again in the context of a FLSA case, rendered, in a short per curiam opinion, a contrary decision. Although agreeing with the *Kinney* decision that "due process" did not mandate notice, the Second Circuit, nonetheless, concluded that notice was permitted in an appropriate case because of the remedial nature of the FLSA and because notice would avoid a multiplicity of suits. *Id.* at 336.

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4. *Kinney* was reaffirmed by the Ninth Circuit in 1981. *See Partlow v. Jewish Orphans' Home of Southern California, Inc.*, 645 F.2d 757 (9th Cir. 1981).

This Court denied certiorari in *Braunstein*, 441 U.S. 944 (1979). At that time, however, only two circuits had addressed the issue of notice. Since *Kinney* and *Braunstein*, five additional circuits have wrestled with notice-related issues with equally inconsistent results. The district courts in the remaining circuits are in similar disarray.

The Seventh Circuit in *Woods v. New York Life Insurance Co.*, 686 F.2d 578 (7th Cir. 1982), was the first appellate court to decide the notice issue in the context of an ADEA case. Espousing yet a "third viewpoint,"[5] the court in *Woods* held that a plaintiff or his counsel in a Section 216(b) action "may communicate, under terms and conditions prescribed by the court, with other members of the class" but concluded that the notice should not "go out on court letterhead over the signature of a court official." *Id.* at 580. The *Woods* court also stated that, in an appropriate case, plaintiff could seek an order directing the defendant to supply the names and addresses of potential opt-in plaintiffs. *Id.* A dissenting opinion in *Woods* concluded that whether the notice states that it has been authorized by the court or is sent over the district court's signature should be left to the discretion of the trial judge. *Id.* at 582. (Eschbach, J., concurring in part, dissenting in part.)

Two years later, both the Eighth and Tenth Circuits rejected the *Braunstein* and *Woods* rationales and disapproved court-authorized notice. In *Dolan v. Project Construction Corp.*, 725 F.2d 1263 (10th Cir. 1984), a FLSA case, the Tenth Circuit comprehensively reviewed the legislative history of Section 216(b). *Id.* at 1266-67. In concluding therefrom that the role and jurisdiction of the courts are limited, the court ruled that discovery, for the purpose of sending notice to potential opt-in plaintiffs,

---

5. *See Dolan v. Project Construction Corp.*, 725 F.2d 1263, 1266 (10th Cir. 1984).

was inappropriate and that the courts are "without authority to issue notice to all potential plaintiffs." *Id.* at 1267-68.

The *Dolan* court, however, disagreed with *Kinney* insofar as *Kinney* disapproved extra-judicial communications by plaintiff and plaintiff's counsel with potential opt-ins. Rather, the *Dolan* court opined that courts should hesitate to restrict such communications particularly because the judiciary can monitor them for potential deception. *Id.*

In the second appellate court opinion to address the notice issue in the context of an ADEA case, the Eighth Circuit, in *McKenna v. Champion International Corp.*, 747 F.2d 1211 (8th Cir. 1984), held that courts lack authority to direct notice to potential opt-in plaintiffs. In so ruling, the court expressly found unpersuasive *Braunstein's* "liberal construction of the FLSA's broad remedial purpose" as well as *Braunstein's* "desire" to avoid a multiplicity of suits. *Id.* at 1213-14. Citing to various ethical considerations, the *McKenna* court further held it inappropriate for plaintiffs' counsel to send notice to potential opt-ins. *Id.* at 1214-17. Finally, discovery of the names and addresses of potential opt-ins was denied as "inconsistent with the limited role given district courts in ADEA class actions." *Id.* at 1217.

A concurring opinion in *McKenna* did not read the majority opinion as prohibiting communications by the plaintiffs with potential opt-ins and, in apparent conflict with the majority decision, stated:

> For this reason, I would permit the district court to resolve disputes about the content of the notice, if any, and, in an appropriate case, to direct the defendant to provide the plaintiff with the names and addresses of potential class members.

Id. at 1217 (McMillian J., concurring).

Finally, in *United States v. Cook*, 795 F.2d 987, 990-93 (Fed. Cir. 1986), a FLSA case, the Federal Circuit, although noting that it was not being requested to issue or approve notice, ordered the disclosure of the names and addresses of potential opt-ins where the explicitly stated purpose for seeking this information was to enable plaintiffs' counsel to send notice of the action.

As of the date of this petition, no opinions deciding the issue of notice under Section 216(b) have been rendered by the remaining circuit courts.[6] Decisions of district courts in those circuits, however, further highlight the split among the federal courts.

For example, in *Held v. National Railroad Passenger Corp.*, 101 F.R.D. 420, 425 (D.D.C. 1984), a district court in the District of Columbia granted plaintiffs' motion to disclose the names and addresses of potential opt-in plaintiffs for the purpose of notifying them of the lawsuit.

Four district courts in the Fourth Circuit have disclaimed the power to authorize court-approved notice to potential opt-ins while one court has sanctioned notice. *Compare Owens v. Bethlehem Mines Corp.*, 108 F.R.D. 207, 214-16 (S.D. W.Va. 1985); *Watkins v. Milliken & Co.*, 613 F. Supp. 408, 419-21 (W.D.N.C. 1984); *Baker v. Michie Co.*, 93 F.R.D. 494, 495-97 (W.D. Va. 1982); *Wagner v. Loew's Theaters, Inc.*, 76 F.R.D.

6. The Eleventh Circuit specifically declined to decide the issue of notice in *Haynes v. Singer Co.*, 696 F.2d 884, 888 (11th Cir. 1983), affirming the district court decision which concluded that, even if the court had the power to authorize notice, it would be inappropriate in that particular case. The District of Columbia Circuit also found it unnecessary to address the issue of notice under the facts presented in *Thompson v. Sawyer*, 678 F.2d 257, 270 n.8 (D.C. Cir. 1982).

23, 24-25 (M.D.N.C. 1977);[7] *with Hubbard v. Rubbermaid Inc.*, 87 Lab. Cas. (CCH) ¶ 33,852 at 48,978 (D. Md. 1979).

One district court in the Fifth Circuit has held that notice is inappropriate in a Section 216(b) case. *See Roshto v. Chrysler Corp.*, 67 F.R.D. 28, 29-30 (E.D. La. 1975). In contrast, two other district courts within the Fifth Circuit have allowed court-authorized notice. *See Johnson v. American Airlines, Inc.*, 531 F. Supp. 957 (N.D. Tex. 1982); *Riojas v. Seal Produce, Inc.*, 82 F.R.D. 613, 619 (S.D. Tex. 1979).

One district court in the Sixth Circuit has ordered, without discussion, notice to potential opt-ins, *see EEOC v. Chrysler Corp.*, 546 F. Supp. 54, 65-66 (E.D. Mich. 1982),[8] while another district court in that circuit has declined to order notice to putative plaintiffs, *see Hallas v. Western Electric Co. Inc.*, 31 Empl. Prac. Dec. (CCH) ¶ 31,958 at 21,320 (S.D. Ohio 1981).

In the Eleventh Circuit one district court has held that it has no power to approve the form or circulation of notice. *See Goerke v. Commercial Contractors & Supply Co. Inc.*, 600 F. Supp. 1155, 1160-61 (N.D. Ga. 1984).[9] But another district court in that circuit has adopted the *Braunstein* rationale. *See Neizil v. Williams*, 96 Lab. Cas. (CCH) ¶ 34,328, at 45,212 (M.D. Fla. 1983).

The Third Circuit decision below recognized that the issue of "the authority of the district court in an ADEA action to facilitate joinder of the putative class members by approving the

7. *See also Hill v. Western Electric Co.*, 76 F.R.D. 4, 6 (M.D.N.C. 1976).

8. *See also Lantz v. B-1202 Corp.*, 429 F. Supp. 421, 424 (E.D. Mich. 1977).

9. *See also Shivers v. Metropolitan Atlanta Rapid Transit Authority*, 27 Wage & Hour Cas. (BNA) 1401 (N.D. Ga. Sept. 9, 1986).

sending of a notice to those who have not yet filed written consents to join the action" is one that has divided the circuits. 862 F.2d ____, App. A at 12a. In rendering its decision, the Third Circuit joined the Second and Seventh Circuits in finding "that there is no legal impediment to court-authorized notice in an appropriate case." 862 F.2d ____, App. A at 19a.

Furthermore, the Third Circuit did not disturb the district court's decision to include in the notice a statement that it was court authorized. To that extent, the *Sperling* decision is in direct conflict even with the Seventh Circuit decision in *Woods* which condemned any indication of court imprimatur on the notice. While expressing some disapproval of the district court's placement of its imprimatur on the notice itself, 862 F.2d ____, App. A at 19a-20a, the Third Circuit, nonetheless, stands alone as the only federal appellate court to uphold such a notice.

In summary, the Ninth Circuit in *Kinney* held that neither the court, the plaintiff nor plaintiff's counsel is authorized to send notice to putative opt-ins and that discovery for that purpose, therefore, is inappropriate. The Tenth Circuit in *Dolan* found court-authorized notice improper but found no impediment to notice by plaintiff or plaintiffs' counsel. The *Dolan* court declined, however, to allow discovery for the purpose of notice. In *McKenna*, the Eighth Circuit ruled against court authorized notice, notice by plaintiffs' counsel or discovery for that purpose. The concurring opinion in *McKenna*, however, assumed, without comment by the majority, that the named plaintiffs would be allowed to send notice and that discovery for that purpose would be permitted.

On the other hand, the Second Circuit in *Braunstein* found in favor of court-authorized notice in appropriate cases. In *Woods*, the Seventh Circuit also concluded that notice was appropriate in some cases, but held, over a dissent, that no indication of court

imprimatur should be included. Finally, the Federal Circuit in *Cook*, although not addressing notice *per se*, permitted discovery for the purpose of the plaintiff sending notice.

None of the cases after the *Braunstein* decision sought review by this Court. This case thus presents the first opportunity since 1979 for this Court to review this obviously controversial issue. It bears repeating that, at the time of the denial of the *Braunstein* petition for certiorari, only two circuit courts had addressed the notice issue. Now seven circuit courts have addressed notice-related issues and, obviously, many critical aspects of those decisions are in conflict. The Third Circuit decision in this case, by allowing not only court-authorized notice but also notice that bears the imprimatur of the court, reflects a minority view among the federal circuits.[10]

The conflict among the circuits reflects a fundamental disagreement over the power of the district courts to authorize and facilitate the circulation of notice to putative opt-in plaintiffs in actions controlled by Section 216(b). In such circumstances, the grant of certiorari to review the judgment below is mandated.

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10. A district court in the Second Circuit noted that *Braunstein* represented a minority position. The district court strongly criticized the decision, but being obligated to follow it, certified the question for appeal. *See Palmer v. Reader's Digest Ass'n. Inc.*, 36 Empl. Prac. Dec. (CCH) ¶ 36,039 at 41,946 (S.D.N.Y. 1986). The Second Circuit, however, declined review. *See Palmer v. Reader's Digest Ass'n. Inc.*, 41 Empl. Prac. Dec. (CCH) ¶ 36,599 at 44,638 (S.D.N.Y. 1986).

II.

The decision below, by approving judicially authorized and facilitated notice in actions governed by 29 U.S.C. § 216(b), raises important questions of federal law, drastically affects multi-party litigation in Section 216(b) actions, and requires the application of this Court's supervisory powers.

The opinion of the Third Circuit in the present case raises important policy considerations concerning the authority of a district court in an ADEA action to authorize and facilitate invitations to putative "class" members to join the action. The lower courts are clearly in need of guidance from this Court on this issue for several compelling reasons.

First, since the enactment of the ADEA in 1967, age discrimination suits have proliferated.[11] The decisions of this Court reflect the burgeoning number of age discrimination claims, with the Court having decided seven cases involving issues arising under the ADEA.[12] The issue of court-authorized notice potentially impacts on every age discrimination claim involving a reduction-in-force, the discontinuation of a business, a plant closing or the

11. While statistics on the number of ADEA-based complaints filed in the district courts are not separately maintained by the Administrative Office of the United States Courts, it is illuminating that in 1987 alone, approximately 27,000 age discrimination complaints were filed with state and federal agencies, *see* F. Strasser, *Legal Action Invades the U.S. Work Place*, 10-No. 26 National L.J. 1,24 (1988), and that age discrimination complaints constitute approximately 20 percent of the EEOC case load. *See* J. Lawrence, *EEOC Notifying Age-Bias Complainants of Mishandled Cases*, Associated Press Release (June 24, 1988).

12. *See Western Airlines, Inc. v. Criswell*, 472 U.S. 400 (1985); *Johnson v. Mayor & City Council of Baltimore*, 472 U.S. 353 (1985); *Trans World Airlines, Inc. v. Thurston*, 469 U.S.111 (1985); *EEOC v. Wyoming*, 460 U.S. 226 (1983); *Lehman v. Nakshian*, 453 U.S. 156 (1981); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979); *Lorillard v. Pons*, 434 U.S. 575 (1978).

like. The resolution of the notice issue thus has an importance far beyond the present controversy.

Second, the notice issue raises significant questions of federal law concerning the construction and application of Section 216(b) and the ADEA in the context of the power of the district courts, *in the absence of any legislative authority whatsoever,* to assist the efforts of one party to solicit the joinder of nonparties. A brief review of the legislative history of Section 216(b) draws into sharp focus the importance of this issue.

As originally enacted, Section 216(b) permitted representative actions without the "opt-in" requirement. *See, e.g., Pentland v. Dravo Corp.*, 152 F.2d 851, 853 (3d Cir. 1945).[13] When this Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), enlarged the compensation available to employees under the FLSA, a "virtual flood of litigation ensued in the form of class actions" under the statute. *Dolan v. Project Construction Corp.*, 725 F.2d at 1266. In response, Congress, adopted the Portal-to-Portal Act of 1947, Pub. L. 49, ch. 52, 61 Stat. 84, 87, which, *inter alia,* amended Section 216(b) by deleting the language authorizing an action by a "designate[d] . . . agent . . . or representative," and by replacing it with the present opt-in procedure. When amending the statute, Congress did not include any provisions regarding notice or class certification procedures.

In 1966, Congress adopted significant amendments to Rule 23. In stark contrast to Section 216(b), the amendments expressly provided for a "class" determination by the court[14] and only upon

13. The statute in its original form is quoted in *Barrett v. National Malleable Steel Castings Co.*, 68 F. Supp. 410, 413 (W.D. Pa. 1946).

14. The original Rule and the 1966 Advisory Committee's comments on the need for amendments are set forth in 3B Moore's *Federal Practice* ¶¶ 23.01[1.-1], 23.01[8] (2d ed. 1987).

the satisfaction of stringent preconditions. In addition, these amendments, for the first time, added provisions to the Rule to notify each class members of his or her joinder unless he or she elected to opt-out of the action. The 1966 Advisory Committee specifically considered but rejected an opt-in procedure for Rule 23," and was careful to point out that the "provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23 as amended." *Schmidt v. Fuller Brush Co.*, 527 F.2d 532, 536 n.4 (8th Cir. 1975).

Just one year later, in 1967, Congress enacted the ADEA. Rather than leaving the issues of notice and multi-party joinder in ADEA cases for resolution under the provisions of Rule 23 (as it had done only a few years earlier in the Civil Rights Act of 1964, 42 U.S.C. §2000 *et seq.*), Congress specifically incorporated into the ADEA the enforcement provisions of Section 216(b).

Given this legislative history, all circuit courts addressing the issue agree that Rule 23 does not apply to actions brought pursuant to Section 216(b). *See, e.g., La Chappelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288-89 (5th Cir. 1975); *Partlow v. Jewish Orphans' Home of Southern Cal. Inc.*, 645 F.2d at 758 and the cases cited therein. Notice to potential Rule 23 class members is required to insure that class members are afforded due process with respect to a suit brought on their behalf and by which they could be bound. In Section 216(b) actions, however, potential claimants who do not opt into the action are not prejudiced for the simple reason that they are not bound by any judgment or settlement. *McKenna v. Champion International Corp.*, 747 F.2d at 1213; *Dolan v. Project Construction Corp.*, 725 F.2d at 1266; *Kinney Shoe Corp. v. Vorhes*, 564 F.2d at 863.

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15. Kaplan, *Continuing Work of the Civil Committees: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356, 397 (1967) (The author served as the reporter to the 1966 Advisory Committee).

Thus, this case presents the important question whether, in the absence of legislative directive, courts should involve themselves in the authorization and facilitation of notice when no due process concerns are implicated. We submit that they should not. *See Pan American World Airways Inc. v. United States District Court*, 523 F.2d 1073, 1077 (9th Cir. 1975).

In addition, Rule 23 procedures serve to protect the defendant and the judicial system against the potential abuses inherent in multi-plaintiff litigation. *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99-100 (1981). Yet the Third Circuit has engrafted notice provisions onto Section 216(b) without any of the safeguards of the Rule 23 class certification procedures. The Eighth Circuit in *Dolan* expressly rejected such an expansive approach without "clear congressional guidance." *Dolan v. Project Construction Corp.*, 725 F.2d at 1268.

Lastly, Congress has empowered this Court to prescribe the rules of practice and procedure for the district courts. *See* 28 U.S.C. § 2072. It thus is important for this Court to provide direction to the lower courts regarding the notice-related and joinder issues which have perplexed and divided lower courts in litigation under Section 216(b). This case, therefore, calls not only for resolution of an important issue of federal law which has a significant impact on the public but also for intervention by this Court in the exercise of its supervisory powers.

III.

Review of the decision below is necessary to rectify the misapplication by the Third Circuit of this Court's opinion in *Shapero v. Kentucky Bar Association.*

In *Shapero v. Kentucky Bar Association*, 486 U.S. ____, 108 S. Ct. 1916 (1988), this Court held that the First Amendment protects non-deceptive direct mail solicitation by attorneys of potential clients even when such solicitations are targeted to specific legal problems (in *Shapero*, mortgage foreclosures). In its decision below, the Third Circuit held that, in light of *Shapero*, there were no longer any "ethical considerations" to address concerning notice to potential opt-ins in actions governed by Section 216(b). 862 F.2d at ____, App. A at 18a. In so ruling, the Third Circuit extended *Shapero* well beyond its intended reach and failed to recognize that the ethical considerations involved in mere advertising are far different from those involved in the sending of notices to persons soliciting their direct joinder in an on-going lawsuit.

In the case of advertising, any targeted prospective client would undoubtedly consult with the attorney prior to the attorney undertaking to represent the client or instituting legal proceedings on the client's behalf. On the other hand, notice to potential opt-ins typically involves, as it would in this case, *see* 862 F.2d at ____, App. A at 4a., the transmittal of a "consent form" to hundreds of prospective plaintiffs which, when completed and returned, becomes, in effect, a complaint filed on behalf of each respondent.

Shapero did not purport to even address, let alone approve of, procedures and prerequisites for the joinder of parties to lawsuits. The "ethical considerations" guiding the filing of a "consent form" complaint are, we submit, reflected in the

provisions of Rule 11 of the Federal Rules of Civil Procedure. That rule has been explained by this Court as one which

> requires pleadings to be based on a good-faith belief, formed after reasonable inquiry, that they are "well grounded in fact . . . . "

Gwaltney v. Chesapenke Bay Foundation, 484 U.S. ____, 108 S. Ct. 376, 385 (1987).

The complaint in the present case alleges, *inter alia*, age discrimination based on disparate treatment of hundreds of Roche employees terminated or demoted in a large-scale reduction-in-force. The decisions to terminate or demote were made by perhaps 100 different managers and supervisors. As the district court below recognized, "[a]t trial each individual plaintiff must bear his or her burden of proof as to each element of an ADEA claim." 118 F.R.D. at 407, App. C at 78a. Court-approved or facilitated notice would lead directly to the filing of potentially hundreds of individual claims without any analysis by counsel of whether these claims are "well-grounded in fact" and without any review by the district court under safeguards such as are set forth in Rule 23.

Thus, the district court's assistance in the solicitation efforts of counsel, under the circumstances here, clearly raises "ethical considerations" beyond those addressed in *Shapero*. Whether the district courts should allow themselves to be used to further the solicitation and direct filing of claims by attorneys on behalf of "clients" with whom they have never consulted is an issue squarely presented by this case and requires guidance from this Court in light of what we believe to be the Third Circuit's misapplication of *Shapero*.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

JOHN A. RIDLEY,
One Gateway Center
Newark, New Jersey 07102-5311
(201) 622-2235
Counsel of Record

RICHARD S. ZACKIN
ANN G. McCORMICK
MICHAEL P. HICKEY
CRUMMY, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE,
A Professional Corporation
One Gateway Center
Newark, New Jersey 07102-5311
(201) 622-2235
Counsel for Petitioner

Of Counsel:

HAROLD F. BOARDMAN, JR.,
General Counsel
EUGENE V. DeFELICE,
Law Department
Hoffmann-La Roche Inc.
340 Kingsland Street
Nutley, New Jersey 07110
(201) 235-5000

January 19, 1989

APPENDIX A — OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED NOVEMBER 30, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 88-5104 and 88-5214

RICHARD SPERLING, FREDERICK HEMSLEY
and JOSEPH ZELAUSKAS, individually and on behalf
of all other persons similarly situated

v.

HOFFMAN-LA ROCHE INC., a New Jersey
corporation,

Appellant

On Appeal from the United States District
Court for the District of New Jersey
(D.C. Civil No. 85-2138)

Argued July 13, 1988

Before: SLOVITER, SCIRICA and WEIS,
Circuit Judges

(Opinion filed November 30, 1988)

John A. Ridley (Argued)
Richard S. Zackin
Crummy, Del Deo, Dolan, Griffinger & Vecchione
Gateway I
Newark, New Jersey 07102

Of Counsel:

Harold F. Boardman
Associate General Counsel
Hoffmann-La Roche Inc.

Appendix A

340 Kingsland Street
Nutley, New Jersey 07110

Attorneys for Appellant

Ben H. Becker
Schwartz, Tobia & Stanziale
22 Crestmont Road
Montclair, New Jersey 07042

Leonard N. Flamm (Argued)
Hockert & Flamm
880 Third Avenue
New York, New York 10022

Attorneys for Appellees

Charles A. Shanor
General Counsel
Gwendolyn Young Reams
Associate General Counsel
Lorraine C. Davis
Assistant General Counsel
Gale Barron Black
Equal Employment Opportunity Commission
2401 E. Street, N.W.
Room 224
Washington, D.C. 20507

Attorneys for Equal Employment Opportunity Commission as Amicus Curiae

OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

I.

Introduction

This appeal is before us following the district court's certification pursuant to 28 U.S.C. § 1292(b) of its order giving court authorization to plaintiffs in an

Appendix A

action under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, to send a notice to those members of the asserted class who have not yet opted in to plaintiffs' suit. The district court, Judge Harold A. Ackerman, identified the controlling question of law as to which there is substantial ground for difference of opinion as whether, in a case governed by 29 U.S.C. § 216(b), "the district court possess[es] the authority to facilitate notice of the action to . . . persons who have not yet filed consents to join the action." App. at 715. This court granted leave to appeal and there is no dispute as to our appellate jurisdiction over this portion of the order, which is before us in No. 88-5214.

The defendant-employer Hoffman-La Roche Inc. (Roche) also moved in the district court to vacate the approximately 400 consents to enter the suit which have already been filed, arguing that those consents were a result of plaintiffs' allegedly "inflammatory, misleading and incomplete" letter sent March 7, 1985, prior to any court authorization. Appellant's Brief in Opposition to Appellees' Motion to Dismiss at 2. The district court denied the motion and thereafter declined to certify that portion of its order under section 1292(b), expressly holding that the controlling question Roche identified as warranting immediate appellate review was not a controlling question of law which offers a substantial ground for difference of opinion.

Roche then filed a petition in this court for a writ of mandamus seeking to reverse the district court's refusal to invalidate the consents. We denied the petition. Roche has, however, filed an appeal from the court's order denying its motion to vacate. Plaintiffs have moved to dismiss that appeal, before us as No. 88-5104. We will consider our jurisdiction over that appeal following a brief summary of the facts and procedural posture of the litigation.

II.

Facts and Procedural History

On February 4, 1985, defendant Roche allegedly fired or demoted some 1,200 workers at its various plants, primarily at two locations in New Jersey, pursuant to a reduction in work force. At the initiative of one or more of the named plaintiffs in this action, a group of employees who had been affected by Roche's reduction in force, with the assistance of counsel, formed a group known as Roche Age Discriminatees Asking Redress (R.A.D.A.R.), which initiated this class action against Roche under the ADEA.

R.A.D.A.R. and its counsel drafted a letter to former employees whom it had identified as within the protected class informing them of the action that had been brought against Roche and inviting them to submit their consents to join the action as plaintiffs. App. at 99-102. The letter was mailed to approximately 600 people on R.A.D.A.R. stationery and signed by Richard Sperling, a named plaintiff in this action. Through R.A.D.A.R.'s letters and "informal networking," over 400 consents were received and have been filed with the court.

Plaintiffs filed a motion requesting the district court to send out notice of the suit to putative class members who had not yet filed consents to join the action. *See* App. at 627. The court held that it was "permissible for a court to facilitate notice of an ADEA suit to absent class members in appropriate cases, so long as the court avoids communicating to absent class members any encouragement to join the suit or any approval of the suit on its merits." *Sperling v. Hoffman-La Roche, Inc.*, 118 F.R.D. 392, 402 (D.N.J. 1988). The court reviewed the language of 29 U.S.C. § 216(b) and its legislative history, finding "nothing in [that history] which might apply to the issue of

court-facilitated notice, at least when it arises in a case other than a portal-to-portal compensation case." *Id.* at 402-03.

The court noted that the ADEA is a "remedial statute" and that because of that remedial purpose, court facilitation of notice would help avoid a situation where a remedy for age discrimination is afforded only those who "are already known to their 'champion.'" *Id.* at 403 (quoting *Woods v. New York Life Ins. Co.*, 686 F.2d 578, 581 (7th Cir. 1982)). It also believed such notice would avoid a burden on the court of "a potentially high number of separate ADEA suits." 118 F.R.D. at 403. The court further noted that the advantages of court-authorized notice in this case would be to avoid further arguments between the parties on the propriety of the content of notice that was sent out and to enable the court to set a final deadline for consents, once the court-authorized notice had been sent. *Id.* at 404.

The court then prepared the content of the notice that was to go out, which it appended to its opinion, *id.* at 415-17, and determined that this notice could then be sent out by plaintiffs or their counsel with the following statement attached: "This notice and its contents has been authorized by the federal district court, Hon. Harold A. Ackerman, Judge. The court has taken no position regarding the merits of the plaintiffs' claims or of Roche's defenses." *Id.* at 417.

In the same order, the district court denied Roche's motion seeking to have the consents already filed voided because of the allegedly prejudicial nature of the March 7, 1985 letter. The court held that the letter was not flawed in any way that vitiated the consents obtained through it, and that the individuals who had elected to opt in to the action had received "sufficiently full and effective disclosure, such that their decisions may be considered informed." *Id.* at 410.

Roche then sought certification of both the portion of the court's order that approved the notice and the portion that refused to void the consents. As noted above, the court certified the former and declined to certify the latter.

III.

Appellate Jurisdiction Over Roche's Appeal of *The District Court's Refusal To Void The Consents*

Roche argues that the district court's order denying its motion to void the consents is a final collateral order reviewable at this time under 28 U.S.C. § 1291 or, in the alternative, that we can review it along with our review of the order certified under 28 U.S.C. § 1292 (b) on the ground that it is part of the same "overall issue" regarding joinder in ADEA cases. Appellant's Brief at 3.

A.

Jurisdiction as a Collateral Order

As the Supreme Court has repeatedly explained, an order qualifying as a collateral order must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action" and (3) "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (footnote omitted); *see Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47 (1949). It is apparent that the order declining to void the consents fails to satisfy the second and third requirements.

Roche seeks to meet the separate issue requirement by arguing that "this Court need not concern itself with the merits of plaintiffs' age

discrimination claims in order to determine that the manner in which the claims of the 'opt-ins' have been solicited was improper and requires the invalidation of the 'consents' heretofore filed." Appellant's Brief in Opposition to Appellees' Motion to Dismiss at 9. However, elsewhere in the same brief Roche explains that one of its objections to the March 7th letter is that "the overall impact of the letter was to solicit claims of age discrimination which are not 'well grounded in fact.'" *Id.* at 4. A determination whether the claims made are well-grounded is the essence of the merits inquiry, and therefore we cannot agree that the validity of the consents and the appropriateness of the solicitation letter can be divorced from the merits of the underlying claims. *See Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1116-17 (3d Cir. 1986), *cert. denied*, 108 S.Ct. 487 (1987) (district court's refusal to bar publication of discovery documents which allegedly presented an unfair picture of the defendant was not a collateral order because an inquiry into whether the materials were "unfair" involved an inquiry into the merits of the case); *New York v. United States Metals Refining Co.*, 771 F.2d 796, 800 (3d Cir. 1985) (protective order temporarily prohibiting release and requiring confidentiality of discovered documents which party claimed were one-sided and prejudicially unfair not collateral final order because inquiry would "implicate the merits").

Review under the collateral order doctrine is also not available to Roche here because the court's order refusing to void the consents can be reviewed on an appeal after a final judgment in the case. In *Lusardi v. Xerox Corp.*, 747 F.2d 174, 178 (3d Cir. 1984), we stated that "[t]he form and content of a notice to a class is generally not subject to 'collateral order' review." We held that Xerox's challenge to the form and content of the notice was not appealable because it could be

effectively reviewed on appeal from the final judgment: at that time the appellate court could revoke the consents and require instead the filing of individual suits after tolling the statute of limitations. *Accord In re Corrugated Container Antitrust Litigation*, 611 F.2d 86, 88 (5th Cir. 1980); *Weit v. Continental Illinois Nat'l Bank & Trust Co.*, 535 F.2d 1010, 1015 (7th Cir. 1976).

Roche argues that the protection accorded it under Rule 11 against frivolous allegations will be irretrievably lost absent an immediate appeal because it will be required to defend against hundreds of unwarranted individual claims of age discrimination. The "swelling in the ranks of class plaintiffs" has been rejected as a basis for *Cohen* collateral order review. *See Corrugated Container*, 611 F.2d at 88. If the added cost of undergoing litigation meant that an order was unreviewable on final appeal, then almost every interlocutory order, including those such as denial of a summary judgment motion, would be immediately appealable.

The Supreme Court has not accepted Roche's limited approach to what can be effectively reviewed after final judgment. The Court has, for example, rejected the contention that an order refusing to disqualify opposing counsel would prevent meaningful review unless immediate appeal is permitted, holding instead that "the potential harm that might be caused by requiring that a party await final judgment before it may appeal . . . does not 'differ] in any significant way from the harm resulting from other interlocutory orders that may be erroneous . . . .'" *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 378 (1981).

Roche's position is simply not comparable to the double jeopardy or qualified immunity situations on which it relies, in large part because it is not in the category those defenses were designed to protect. The rights protected by the Double Jeopardy clause, *see Abney v. United States*, 431 U.S. 651, 658-62 (1977),

the Speech or Debate clause, *see Helstoski v. Meanor*, 442 U.S. 500, 506-08 (1979), and absolute or qualified immunity, *see Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985), are *sui generis* for purposes of the collateral order doctrine. They protect the defendants from the trial itself. Roche can claim no comparable privilege.

Roche's attempt to analogize this case to *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190 (3d Cir.), *cert. denied*, 464 U.S. 938 (1983), must also fail. In *Coastal Steel*, we held that an order declining to enforce a contractual forum selection clause was immediately appealable under the *Enelow-Ettelson* doctrine and, alternatively, as a collateral order which would be barred from subsequent review as a "matter in abatement" under 28 U.S.C. § 2105. The *Enelow-Ettelson* doctrine has now been discarded. *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S.Ct. 1133 (1988).

Roche somewhat creatively argues that the order in this case declining to void the consents can, like that pretrial order in *Coastal Steel*, be viewed as a "matter in abatement" under 28 U.S.C. § 2105. We reject the analogy because even if Roche's motion to void the consents were granted, the result would not "defeat" the plaintiffs' action. *See Nascone v. Spudnuts, Inc.*, 735 F.2d 763, 771 (3d Cir. 1984).[1] Significantly, in

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1. A "matter in abatement" is generally considered to involve "nonjurisdictional motions which, if granted, would result in the dismissal of an action without prejudice to its reconsideration when refiled in another forum or another pleading." *Coastal Steel*, 709 F.2d at 196. As we explained in *Spudnuts*, 735 F.2d at 771, if the district court in *Coastal Steel* had dismissed the action as requested because it belonged in a foreign forum, this would have defeated the action and required it to be recommenced, thereby qualifying it as a "matter in abatement." In contrast, in *Spudnuts* we held that an order transferring a case to another forum within the federal system was not a matter in abatement because it did not require recommencement of the suit. 735 F.2d at 771.

Coastal Steel we held that the rejection of a *forum non conveniens* claim was not reviewable as a collateral final order because it took into account considerations going to the merits of the case. 709 F.2d at 195.

We conclude, therefore, that we have no jurisdiction under the collateral order doctrine over that portion of the district court's order declining to void the consents of the opt-in plaintiffs.

B.

Jurisdiction under § 1292(b)

Roche argues that even if the refusal to void the consents is not independently reviewable, we can review it as involving an issue related to the portion of the order that we will consider as part of the appeal certified under 28 U.S.C. § 1292(b). The cases on which it relies do not support exercise here of that form of pendent appellate jurisdiction.

In *Mellcan, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958 (3d Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984), this court held only that, in considering an order that has been certified for appeal, we can consider "all *grounds* which might require a reversal of the order appealed from." *Id.* at 962 n.7 (emphasis added). It is true that our opinion in *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986), was more expansive. We held there that because we were reviewing under a 28 U.S.C. § 1292(b) certification the question of the applicability of the Anti-Injunction Act to the mandatory class action under Rule 23(b)(1)(B), we also had jurisdiction over the Rule 23(b)(2) and (b)(3) certifications because they involved many of the same factors. *Id.* at 1002.

In contrast, in this case the question whether a court has the power to authorize notice in an ADEA action, which is before us in the certified appeal, is not closely related to the question whether the consents already received should be voided because the letter obtaining those consents was allegedly prejudicial or one-sided. The former is a legal issue, whereas the latter is primarily a factual question which requires an evaluation of the solicitation of consent letter sent out by plaintiffs under the circumstances of this case. *See Link v. Mercedes-Benz of North Am.*, 550 F.2d 860 (3d Cir.), *cert. denied*, 431 U.S. 933 (1977) (declining to review question certified on section 1292(b) appeal on the ground that matter was one of fact). It therefore does not lend itself to the concurrent review situation presented in *In re School Asbestos*. *See Johnson v. Alldredge*, 488 F.2d 820, 822-23 (3d Cir. 1973), *cert. denied*, 419 U.S. 882 (1974) (confining scope of review to controlling question of law and not factual issues presented in question certified by district court).

We are also concerned that if this court were to expand our jurisdiction to include jurisdiction under 28 U.S.C. § 1292(b) over an issue which the district court already held was not appropriate for certification, we would undermine the statutory scheme of that section by undermining the discretion that Congress vested in the district court in the first instance. Nothing about the court's order refusing to void the consents warrants our taking such an exceptional step.

Because we have concluded that we have no jurisdiction over the district court's order denying Roche's motion to void the consents, we will dismiss appeal No. 88-5104 and turn to the merits of the remaining appeal.

IV.

Propriety of Court-Authorized Notice

This court has not yet ruled on the authority of the district court in an ADEA action to facilitate joinder of

the putative class members by approving the sending of a notice to those who have not yet filed written consents to join the action. The issue, which arises under both the FLSA and the ADEA, has divided the circuits. *Compare United States v. Cook*, 795 F.2d 987, 993 (Fed. Cir. 1986) (authorizing discovery of names and addresses of potential class members); *Woods v. New York Life Ins. Co.*, 686 F.2d 578, 582 (7th Cir. 1982) (allowing court-approved notice); *Braunstein v. Eastern Photographic Labs, Inc.*, 600 F.2d 335 (2d Cir. 1978) (per curiam), *cert. denied*, 441 U.S. 944 (1979) (same); *with McKenna v. Champion Int'l Corp.*, 747 F.2d 1211, 1214 (8th Cir. 1984) (disapproving court-authorized notice); *Dolan v. Project Constr. Corp.*, 725 F.2d 1263, 1267-69 (10th Cir. 1984) (same); *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859, 864 (9th Cir. 1977) (same). In this case, the Equal Employment Opportunity Commission (EEOC) has filed an *amicus* brief arguing that the district court correctly concluded that it was authorized to approve issuance of notice of the action to potentially similarly situated ADEA claimants.

Section 7(b) of the ADEA, 29 U.S.C. § 626(b) (1982), adopts and incorporates the enforcement provisions of the Fair Labor Standards Act (FLSA). Among the FLSA procedures incorporated into the ADEA is that which permits bringing a collective action. Under section 16(b) of the FLSA, codified at 29 U.S.C. § 216(b) (1982) (referred to hereafter as section 216(b) for convenience), "[a]n action . . . may be maintained [under the FLSA] . . . by any one or more employees for and in behalf of himself or themselves *and other employees similarly situated.*" (Emphasis added). Unlike Rule 23 class actions, the FLSA collective action requires the class members to signify their consent, commonly referred to as an "opt-in" provision. This is effected by the portion of § 216(b)

which provides: "No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b). Thus, the twin requirements for a class action to proceed under the ADEA are that the employees in the class must be "similarly situated" and that each class member must file an individual consent.

Roche argues that because Congress amended the FLSA in 1947 by deleting the language authorizing an action by a "designate[d] . . . agent . . . or representative." Congress chose to curb the availability of class actions in FLSA cases under § 216(b). Therefore, Roche reasons, Congress' failure to include any notice provision in § 216(b) was a deliberate decision by Congress against court-authorized notice. Roche also argues that because Rule 23 was amended in 1966 to provide for class certification and court-authorized notice, we should construe the failure of Congress to make parallel amendments to § 216(b) as signifying congressional hostility to court-authorized notice of actions under § 216(b).

It is these two factors, the amendment to § 216(b) and the difference between the "necessarily active" role of the district court in a Rule 23 class action with its "only passive duties and limited jurisdiction" in a § 216(b) action that were given by the court in *Dolan v. Project Construction Corp.*, 725 F.2d 1263, 1266-68 (10th Cir. 1984), as the basis for its conclusion that § 216(b) does not allow for court authorization of notice to potential plaintiffs in an FLSA action. The *Dolan* court stated that Congress, "[w]hile still providing for collective and representative actions, . . . intended to severely limit the burden on the defendant and the participation of the court." *Id.* at 1267. It thus held that the court lacked power to order discovery of the

names and addresses of potential opt-ins and to issue notice to all potential plaintiffs. *Id.* at 1267-68. The *Dolan* court, however, did not preclude "a level of reasonable communication" by counsel with those parties s/he could discover without judicial assistance. *Id.* at 1268.

Similar conclusions have been reached by two other courts of appeals. In *McKenna v. Champion International Corp.*, 747 F.2d 1211 (8th Cir. 1984), the court, in addition to relying on the 1947 amendment for its holding that the district court could not authorize notice to prospective class members, also held that plaintiff's counsel must be barred from sending such notice on the ground that such solicitation could give rise to ethical violations. *Id.* at 1214, 1216-17.

The court held that prohibiting plaintiffs' counsel from sending notice to prospective class members advances the interest underlying Model Code of Professional Responsibility DR 2-103(A) (1979) (a "lawyer shall not *** recommend employment as a private practitioner of himself *** to a lay person who has not sought his advice regarding employment of a lawyer."). 747 F.2d at 1215-16. The court analogized "direct-mail solicitation of particular plaintiffs for a particular lawsuit" as approaching the type of in-person solicitation which was not protected by the First Amendment. *Id.* at 1216.

McKenna relied in part on the Ninth Circuit's decision in *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859 (9th Cir. 1977), which held that the court could not authorize notice and that counsel could not send notice of the pending action to potential opt-ins, reasoning that because members of a § 216(b) class are not bound by the result reached in the litigation case, as are class members in a Rule 23 class, there was no due process need for notice in § 216(b) actions. *Id.* at

864. The court also reversed the district court's order requiring the employer to furnish an employee list for plaintiffs' use in contacting their colleagues.

We do not find persuasive the arguments adopted by these courts. Turning first to the legislative history, there is nothing to suggest that in eliminating representative actions Congress intended to affect what it called the collective action. The 1947 amendments were designed for a different purpose.

In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), the Supreme Court had construed the FLSA as requiring compensation to employees for time spent in the plant before and after their work shifts. In the six months following that decision, more than 1,000 suits were filed seeking over five billion dollars in compensation. *See* H. Eglit, 2 *Age Discrimination* § 17.32 n.5 (1982). In response, Congress enacted the Portal-to-Portal Act of 1947, which "was intended to curtail the numerous suits for unpaid compensation and liquidated damages under the FLSA that were filed after [*Anderson*]." *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 780 (1981).

The Portal-to-Portal Act provided that employers were not liable for compensation to employees for time spent traveling to and from worksites or for other activities conducted prior to or after the employees' "principal" work activity, thus effectively overturning the Supreme Court's contrary interpretation of the FLSA. *See* 29 U.S.C. § 254 (codifying ch. 52, § 4, 61 Stat. 86). At the same time, Congress made other amendments to the FLSA, among them the repeal of "representative actions" which had allowed non-employees representatives or agents to commence suits on employees' behalf. Portal-to-Portal Act of 1947, Pub. L. No. 49, § 5, 61 Stat. 87.

In explaining this amendment, Senator Donnell, who was chairman of the subcommittee which

conducted hearings on the amendments, distinguished between representative actions and what he termed collective actions. He explained that the amendments were designed to eliminate the representative action in which "an outsider, perhaps someone who is desirous of stirring up litigation without being an employee at all, is permitted to be the plaintiff in the suit." 93 Cong. Rec. 2182 (1947). On the other hand, Senator Donnell stated that "[w]e see no objection" in the collective action, *i.e.*, "a suit by one or more employees for himself and all other employees similarly situated." *Id.* There is, of course, no question that Sperling's suit falls into this category.

Perhaps the most significant evidence that Congress did not intend to preclude notice to class members by the 1947 amendments is the fact that the statute still expressly authorizes a plaintiff to bring the action on behalf of "other employees similarly situated," 29 U.S.C. § 216(b), albeit employees who must opt-in to join. The continued authorization for bringing collective or quasi-class actions under the procedural provisions of the FLSA demonstrates Congress' lack of hostility to such actions, if nothing more. However, if a plaintiff could not contact and solicit the consents of other "similarly situated" individuals, the congressionally sanctioned form of action would be meaningless. We agree with the EEOC that "[w]ithout such notice, the statute's explicit approval and authorization of collective actions would be seriously undermined." *Amicus* Brief at 7-8.

Roche places undue significance on Congress' failure to add a notice provision to 29 U.S.C. § 216(b) when Rule 23 was amended in 1966 to so provide. As explained by the Advisory Committee, notice was provided in Rule 23 because there would be a due process problem if absent parties were to be bound without such notice. Fed. R. Civ. P. 23(d)(2) Advisory

Committee Note. A class action under § 216(b) cannot bind absent parties, and, in the absence of any other explanation deriving from the legislative history, it seems most plausible that no notice was provided for in § 216(b) because it was not required for due process reasons. That cannot be taken as evidence that Congress intended to bar court-authorized notice in an appropriate case.

The district court's rationale in authorizing notice to putative class members and requiring divulgence of their identities followed the analysis articulated by Judge Posner in *Woods* v. *New York Life Ins. Co.*, 686 F.2d 578 (7th Cir. 1982). There the court explained that § 216(b) does more than create the right of permissive joinder already provided by Rule 20 of the Federal Rules of Civil Procedure. *Id.* at 580. Instead, it continued, the section's authorization of a representative action, "surely must carry with it a right in the representative plaintiff to notify the people he would like to represent that he has brought a suit, and a power in the district court to place appropriate conditions on the exercise of that right." *Id.* It followed that counsel for a representative plaintiff could seek from the district court an order approving the notice "to protect himself from being accused of stirring up litigation in violation of state law. . . . as well as an order directing the defendant, in an appropriate case, to furnish the plaintiff with the names and addresses of potential class members." *Id.*

An examination of § 216(b) yielded a similar conclusion in *Braunstein* v. *Eastern Photographic Labs.*, 600 F.2d 335 (2d Cir. 1978) (per curiam), *cert. denied*, 441 U.S. 944 (1979), which held that a district court could authorize notice to potential plaintiffs in an FLSA action. The court concluded that rather than reading the omission of any provision for notice as deliberate, "it makes more sense, in light of the 'opt-in'

provision of § 16(b) of the Act, 29 U.S.C. § 216(b), to read the statute as permitting, rather than prohibiting notice in an appropriate case." *Id.* at 336. The court emphasized both the "broad remedial purpose" of the FLSA and the "interest of the courts in avoiding multiplicity of suits." *Id.*

More recently, in *United States v. Cook*, 795 F.2d 987, 991-93 (Fed. Cir. 1986), that court rejected the contention that the legislative history of the 1947 amendments to § 216(b) signified that Congress did not intend to require employers to assist in providing notice to potential plaintiffs. The court in *Cook* concluded that the district court did have the power to issue a discovery order directing the defendant to release employees' names and addresses to "facilitate" notice of a pending FLSA action. *Id.* at 993.

We thus agree with those courts that have held that the silence of the legislative history on the question of notice to class members together with the continued congressional sanction for actions brought under the FLSA, and thereby the ADEA, on behalf of similarly situated persons must be taken to mean that Congress has imposed no bar to court-authorized notice.

We consider next whether there are any other reasons which would counsel us to impose such a prohibition as a policy matter. It is now clear that the ethical considerations relied on in *McKenna* do not withstand the Supreme Court's decision in *Shapero v. Kentucky Bar Association*, 108 S.Ct. 1916 (1988). In *Shapero*, the Court held that the First Amendment's protection of commercial speech encompasses targeted direct-mail solicitation by lawyers for pecuniary gain. It follows that communications which the district court finds to be truthful and nondeceptive, designed to inform putative class members of the pendency of the suit and their opportunity to consent to join, cannot be

barred under the guise of being unprofessional or unethical.

As the *Amicus* Brief of the EEOC points out, there are policy reasons favoring court-authorized notice in ADEA cases. Not only does such communication serve the remedial purpose of the ADEA, but court-authorized notice allows the court to regulate the content of the notice that is sent out. Indeed, had the terms and conditions of the initial notice been presented for court review much of the present dispute resulting from some of the unfortunate language used in the March 7th letter would have been avoided. Such notice also allows the court to set cut-off dates for receipt of consents, and helps avoid the judicial burden of a multiplicity of individual suits.

We thus agree with the district court's conclusion that there is no legal impediment to court-authorized notice in an appropriate case. It is, of course, within the discretion of the district court whether and how to implement such notice. We assume that the district courts will exercise caution that notices approved by the courts will not give the erroneous impression that maintenance of the action has a judicial imprimatur of approval. In this respect, the notice necessarily differs from that in a Rule 23 action. In this case, the district court rejected plaintiffs' request that the notice be sent on court letterhead. *See also Woods*, 686 F.2d at 582 (holding that the court-authorized notice may not be on judicial letterhead or signed by a judicial officer). In light of the district court's inclusion of the language that "the court has taken no position regarding the merits of the plaintiffs' claims or of Roche's defenses," we do not reach the question whether the statement that the notice has been "authorized" by the court should have been included. *Sperling*, 118 F.R.D. at 417. Ordinarily, the better practice would be to exclude any

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reference in the notice indicating it had been approved or authorized by the court.

Roche contends that since over 400 plaintiffs out of a potential class of 600 have already opted in, there was no need for additional court-authorized notice to be sent out in this case. The plaintiffs respond that their success in soliciting opt-ins should not be held against them, and should not bar sending notice to others who may not have learned of the suit. *See Allen v. Marshall Field & Co.*, 93 F.R.D. 438, 443 (N.D. Ill. 1982) ("That some potential claimants have [already] learned of their rights under the ADEA and [of] this action is no reason to depend upon informal means of communication to get this information to other members of the class.").

We see no reason to extend our jurisdiction in this appeal certified under 28 U.S.C. § 1292(b) beyond the question of the court's authority to facilitate notice to putative class members by authorization of the communication. Assuming that we have the power to do so, we do not choose to reach the issue of whether the court abused its discretion by approval of the form of notice in this case.

V.

Conclusion

In summary, we hold that we have no jurisdiction over Roche's appeal of the district court's denial of its motion to invalidate the consents already filed, and will dismiss that appeal. In the certified appeal, we hold that the district court does have the power to authorize notice to be sent to plaintiffs in an opt-in class filed under the Age Discrimination in Employment Act and to review the content of such notice before it is communicated to the class members. We will, therefore, affirm the portion of the district court's

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order that so holds and remand this action for further proceedings consistent with this opinion. Costs to be assessed against appellant.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix A

APPENDIX A — NOTICE OF JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

November 30, 1988

TO: (John A. Ridley, Esq.
(Richard S. Zackin, Esq.
Leonard N. Flamm, Esq.*
Ben H. Becker, Esq.
Gale Barron Black, Esq.

NOTICE OF JUDGMENT

This Court's opinion was filed and Judgment was entered today in case No. 88-5104 and 88-5214 and copies are enclosed herewith.

PETITION FOR REHEARING (FRAP 40)

Your attention is specifically directed to Chapter VIII B of the Court's Internal Operating Procedures.

B. Rehearing In Banc.

Rehearing in banc is not favored and ordinarily will not be ordered except

(1) where consideration by the full court is necessary to secure or maintain uniformity of its decisions, or

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* See attached Bill of Costs form.
Direct Dial - 597-3143

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(2) where the proceeding involves a question of exceptional importance.

This Court does not ordinarily grant rehearing in banc where the panel's statement of the law is correct and the controverted issue is solely the application of the law to the circumstances of the case.

Nor, except in rare cases, has the court granted rehearing in banc where the case was decided by a judgment order, a memorandum opinion, or unpublished per curiam opinion.

When a petition for rehearing has been filed by a party as provided by FRAP 35(b) or 40(a), unless the petition for panel rehearing under 40(a) states explicitly it does not request in banc hearing under 35(b), it is presumed that such petition requests both panel rehearing and rehearing in banc.

Rule 22.1

Attachments	Attach to each petition for rehearing a copy of the judgment, order or decision of the Court as to which rehearing is sought and any memorandum or opinion of the court stating the reasons therefor.

Bill of Costs (FRAP 39)

Filing Time	A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment. The bill of costs must be *received* in the Clerk's office within the 14 day period.

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Form

Counsel desiring to have costs taxed against the unsuccessful party under Rule 39, FRAP is requested to furnish an itemized and verified statement from the printer showing the actual costs per page for reproducing the brief and appendix (if any). Proof of service of the bill of costs must be attached to the bill.

Mandate (FRAP 41)

Issuance Time

The mandate is issued 21 days after judgment. A timely petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. A motion for stay of mandate should be promptly filed if parties intend to file a petition for writ of certiorari to the Supreme Court of the United States.

Sally Mrvos, Clerk

Enclosures

Rev. 5/86

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY REGARDING CERTIFICATION FOR APPEAL PURSUANT TO 28 U.S.C. § 1292(b) FILED JANUARY 25, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 85-2138

SPERLING,

Plaintiff,

-v-

HOFFMAN - LA ROCHE,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Newark, New Jersey

January 25, 1988

BEFORE:

HONORABLE HAROLD A. ACKERMAN
UNITED STATES DISTRICT COURT JUDGE

Appearances:

SCHWARTZ, TOBIA & STANZIALE, P.A.
BY: BEN H. BECKER, ESQ. and
LEONARD FLAMM, ESQ.,
For Plaintiffs.

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CRUMMY, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE
BY: IRA J. HAMMER, ESQ. and
JOHN RIDLEY, ESQ.,
For Defendants.

[2*] January 25, 1988.

THE COURT: May we have the appearances?

MR. RIDLEY: Your Honor, John Ridley and Ira Hammer of Crummy, Del Deo for the defendant, Hoffman-LaRoche.

MR. BECKER: Ben Becker, co-counsel for the plaintiffs.

MR. FLAMM: Leonard Flamm, co-counsel for plaintiffs.

THE COURT: I've read all the papers and I'm prepared to decide this motion brought on by HLR unless the parties have something to tell me that they haven't told me before.

Mr. Ridley, you represent the movant.

MR. RIDLEY: Your Honor, I think it may be helpful to simply bring your Honor up to date with respect to the status of discovery and how that, if at all, impacts on the certification, which we seek.

THE COURT: It doesn't because I have been informed that discovery is going ahead.

MR. RIDLEY: That's correct, your Honor. It has, indeed.

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* The numbers appearing in brackets throughout this transcript denote the beginning of the corresponding page in the original transcript.

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THE COURT: What you're seeking, of course, among other things, is a stay on the notice problem essentially.

[3] MR. RIDLEY: That is all that we seek. When you say "among other things," I'm not sure to what you refer.

THE COURT: I'm talking about the consent, the two issues that you want certified.

MR. RIDLEY: All that we seek to do with respect to the stay is to stay the mailing of any notice.

We are prepared to go ahead with all other aspects of discovery while the Circuit would consider that particular issue.

In fact, we have met, we have met with the magistrate, we've met together and we have agreed on a very substantial course of discovery which involves our production of many, many thousands of documents and the like.

THE COURT: That's extremely gratifying to me because of what I said in the opinion, namely I felt that there have been undue delay with respect to the matters. I'm gratified to hear that the discovery process is in motion.

MR. RIDLEY: Your Honor, because your Honor has indicated that you've read the papers and, frankly, my argument would simply be to highlight certain of the issues, I am prepared to simply answer any questions that your Honor might have with respect to the papers.

[4] THE COURT: I read the papers and I have no questions, Mr. Ridley.

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Mr. Becker, do you have anything to add?

MR. BECKER: We'll submit.

THE COURT: I'll decide the case. This is a punitive class action brought in accordance with the "opt-in" procedures of the Fair Labor Standards Act. *See* 29 U.S.C. section 216(b). Plaintiffs, former employees of the defendant, allege age discrimination and state law contract claims against defendant arising from a reduction in work force instituted by the defendant in February of 1985.

On January 5, 1988, I issued a lengthy opinion and order addressing a number of motions which the parties have brought concerning, for the most part, issues of class formation, certification and membership. Defendant now moves on short notice to certify two parts of my January 5th order, for interlocutory appeal and to stay the relief granted in those two parts of my order pending appeal, all in accordance with 28 U.S.C. section 1292(b).

Section 1292(b) of Title 28 states in full: "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference [5] of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals

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or a judge thereof shall so order."

The standards that govern the certification of interlocutory appeals pursuant to section 1292(b) were set forth over 13 years ago in *Katz v. Carte Blanche Corp.*, 496 F.2d 747, at 754, (3d Cir.), (*en banc*), *cert. denied*, 419 U.S. 885, (1974). *Katz* remains the guiding light on 1292(b) issues, generally in this circuit. According to *Katz*, section 1292(b):

"Imposes three criteria for the district courts exercise of discretion to grant a section 1292(b) certificate. The order must (1) involve a 'controlling question of law'; (2) offer 'substantial ground for difference of opinion' as to its correctness; and (3), if appealed immediately, 'materially advance the ultimate termination of the litigation.' "

496 F.2d at 754 (quoting) 28 U.S.C. section [6] 1292(b).

The Court further stated that the "key consideration" in deciding whether to certify an order for interlocutory appeal is "whether the order. . .truly implicates a policy favoring interlocutory appeal. The determination of what orders are properly reviewable under section 1292(b) must be made by a practical application of those policies. . . those policies, both before and since the enactment of section 1292(b) have included the avoidance of harm to a party pendente lite from a possibly erroneous interlocutory order and the avoidance of possibly wasted trial time and litigation expense." 496 F.2d at 756.

The Court also referred to the first of these policies as avoiding "prejudice to a party pendente lite." 496 F.2d at 756.

In commenting specifically on the "controlling question of

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law" prong of the three pronged test, the Court asked and answered the following question: "in order for a question to be 'controlling' must it be one which if decided erroneously would lead to a reversal on appeal? Certainly Judge Maris, testifying in favor of the bill on behalf of the Judicial Conference, did not think so. His testimony suggests that 'controlling' means serious to the conduct of the litigation [7] either practically or legally. . . and on the practical level, saving of time of the district court and of expense to the litigants was deemed by the sponsors to be a highly relevant factor." 496 F.2d at 755.

In short, before I may certify any part of my January 5th order for interlocutory appeal, I must evaluate those parts of the order for which certification is requested under the three conjunctive section 1292 factors, including the factor which questions whether the parts of the order for which certification is requested are, legally or practically, controlling, in such a way as to give practical application to the policies informing the statute, inciuding the avoidance of harm pendente lite, wasted trial time and litigation expense.

Defendants seeks certification of the rulings embedded in paragraphs three and five of my January 5 order. As stated in defendants papers, the issues for interlocutory appeal are these:

"1. In this case brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. section 621 *et seq.*, where the joinder in the action of persons other than the named plaintiffs is governed by 29 U.S.C. section 216(b), does the district court possess the authority to facilitate notice of the action for said persons who have [8] not yet filed consents to join the action?

"2. In this case brought pursuant to the Age Discrimination

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in Employment Act, 29 U.S.C. section 621 *et seq.*, where the joinder in the action of persons other than the named plaintiffs, is governed by 29 U.S.C. section 216(b), should the district court have vacated the consents to join this action and issue corrective notice with regard to those persons who have theretofore filed consents to join this action in response to a letter of March 7, 1985. . . .?"

In applying the test of certification, I shall take these issues in reverse order.

For the following reason, it is clear to me that the second issue, concerning the validity of the previously filed consents should not be certified.

First, I find no controlling question of law in the second issue which offers a substantial ground for difference of opinion. As plaintiffs point out, my decision regarding the validity of the consents was a determination of mixed law and fact, not a determination of law alone. Were I to parse out the purely legal determinations which I made in validating the consents, I would come up merely with my conclusion that for a plaintiff's consent to be valid, it must be based on "full and effective disclosure sufficient to enable [the [9] consenting party] to make an informed decision". January 5, 1988, slip op. at 36 (quoting *I.B.M. v. Levin*, 579 F.2d 271, 282, (3d Cir. 1978). (The bracketed phrase was added in the January 5th opinion, I note).

Despite the truth in defendant's observation that the issue of what constitutes valid consent under 29 U.S.C. 216(b), has received no discernable treatment in prior case law, I believe that the definition of valid consent which I adopted is not one on which any serious difference of opinion would ever develop. Conceivably,

my fact finding on the issue of the validity of the consents could be reviewed on appeal under a clearly erroneous standard, but I am simply unpersuaded that under such a standard my factual findings would give rise to a serious difference of opinion. I note that while defendant has again argued that "the issue of counsel's involvement in notice in cases governed by 29 U.S.C. section 216(b)" is an important issue within the context of this case, I disagree for reasons stated in my January 5 opinion. Thus, I find that the issue of the prior consent does not give rise to seriously debatable controlling questions of law.

Second, I do not see how certification on the issue would materially advance the litigation. Were my decision [10] on the issue to be affirmed, the case would have lost the time and money consumed by the appeal. Were my decision to be reversed, then the case would be back at its starting point in regard to class formation, and further time and money would be lost at least soliciting the prior consenters and reforming the class.

Nor would resolicitation at this point in the case decrease the number of prior consenters for any reason which this Court should consider fair or salutory. I believe that even if some of the prior consenters were unduly persuaded into joining this case, these consenters would not drop out after a resolicitation which is the relief defendant has sought on the consent issue. As the Third Circuit recognized in an analogous context in *Lusardi v. Xerox Corporation*, 747 F.2d 174 (3d Cir. 1984), in regard to potential plaintiffs already notified of a pending age discrimination class action who arguably should not have received the notice they did, the "harm" is "complete," 747 F.2d 179, and those plaintiffs will most probably choose to remain in the action, wrongfully or not, until the bitter end of final judgment and final appellate review. Thus, an interlocutory resolicitation in the case

at hand would only eliminate plaintiffs who have died, will give up in frustration in the face of another pretrial delay, who will wrongly infer harrassment from the court or the parties, or who will wrongly infer weakness in the merits of claims which have not yet been [11] subjected to any significant factual scrutiny in court.

I note that defendant has already represented that it would not oppose re-consenting plaintiffs after a resolicitation on the issue of statutes of limitation. This Court should not encourage plaintiffs to drop out of this case for such reasons. Thus, there are no valid reasons why the composition of the consenters should change as a result of an interlocutory resolicitation. This conclusion supports my prior conclusion that certification of the consent issue will not materially advance this litigation and also shows that the general section 1292 goal of avoiding harm or prejudice *pendente lite*, in this instance to defendant, would not be served by certification of the issue of the validity of the consents.

For all these reasons, I find that none of the section 1292(b) factors practically applied would be served by certifying the second issue presented by defendant. I shall deny defendant's request for certification on this issue.

I turn now to the first issue on which defendant seeks certification, the issue of court facilitation of notice in an ADEA class action brought under 29 U.S.C. section 216(b). I understand defendant's statement of the issue to cover the mailing of notice by plaintiffs to [12] unknown potential class members, but to exclude my order compelling discovery of names and addresses to facilitate that mailing.

It is clear to me, having canvassed the way different courts

have decided the issue differently in my January 5th opinion, that the issue of court facilitation of notice in ADEA class actions is one that offers substantial ground for difference of opinion.

See e.g., Katz, cited, 754-55, discussing the obvious "difference of opinion" aspect to an issue on which "it took two district courts to arrive at a decision". *See also Lusardi*, 747 F.2d 176, calling the issue "novel and unresolved."

It is also clear to me that the issue is a pure question of law, and that it is controlling within the meaning of section 1292(b). Plaintiffs have sought this notice because they believe that perhaps 200 class members have yet to join the action; this is one-half again the number of class members who have joined this action. To so increase the number of class members facing defendant would clearly alter the case significantly. The time and money involved in investigating and litigating issues on which the positions of class members might differ, such as the "similarly situated" issue would surely increase. Such issues as the equitable tolling issue would for the [13] first time in this case take on large proportions. Most importantly, defendant's exposure to civil liability will increase up to 50 percent. Essentially, once the authorized notice in this case went out, defendant would face up to perhaps 200 new possible plaintiffs, within this case or in separate actions. As a practical matter, notice will, for defendant, drastically change the character of this action and the factors to consider in deciding whether or not to keep litigating and how to litigate. Plaintiffs will face corresponding changes in their position. Thus, I find that the notice issue, as a practical matter, controlling.

I further find that an interlocutory determination of the notice issue may materially advance the ultimate determination of the

litigation. If my notice decision is reversed, the number of plaintiffs to whom discovery and perhaps trial on some issues must be individually addressed will be reduced to about 400 from, potentially, about 600. This will, of course, yield some savings in time and money. With the notice issue resolved, either by affirmance or reversal, both sides may perceive a stronger certainty about the parameters of liability in this case, making an early settlement conceivably more attractive to all parties. Thus, certification may serve the goal of advancement.

[14] Finally, I note the statement in *Katz* that one purpose of section 1292(b) is to avoid "harm" or "prejudice" *pendente lite* to a party in a case. *See* page 756 of that opinion. Although this statement is somewhat general, I believe that it fits the notice issue in the case at hand, where the practical stay for defendant is whether or not up to 200 more potential plaintiffs would get what may be their first notification of this lawsuit along with a consent to join form. As I stated earlier in my discussion of certification of the consents issue, quoting *Lusardi*, 747 F.2d at 179, the "harm" of overly broad notice may be irremediable, short of final judgment against all notified plaintiffs.

For all these reasons, I shall grant defendant's request for certification on the first issue identified by the defendant. I shall also stay the notice by plaintiffs, which I authorized on January 5, until the Third Circuit disposes of the issue I have sent them.

Since in accordance with my decision today, the plaintiff class still numbers about 400, I see no reason why discovery and other pretrial practice regarding every other aspect of the case should be slowed at all because the notice issue has been certified.

Mr. Ridley, I have signed an order that I believe you were

kind enough to submit, which of course you can [15] look at as well as your adversary. Rather than have you draw another order, I just went ahead and signed it. I won't burden you again unless there is some dispute.

MR. RIDLEY: Thank you.

THE COURT: Good afternoon.

MR. RIDLEY: I don't know whether the time is to address it, but in discussing the matter with counsel, looking at the parameters of your Honor's earlier order, a question did arise that I think bears consideration by the Court. It's this: We know that there are a number of individuals who received notice back in early 1985. We don't know all of those individuals, but we do have certain lists of people who received notice.

Your Honor's order of January 5, at point three, paragraph three, speaks to the mailing out of notice and consent to join forms to newly discovered count one class members.

Now, in our papers, we had addressed the issue, although I don't think we made a motion seeking dispositive ruling on it, but —

THE COURT: Paragraph three?

MR. RIDLEY: Paragraph three, your Honor, of your January 5th order, the last line on the first page.

THE COURT: To newly discovered, yes, yes.

[16] MR. RIDLEY: In dealing that with Mr. Flamm, I think

at some point, and perhaps now by virtue of the stay, it can be deferred until we can define it more accurately, but at some point I think we do need a definitive direction from the Court in that regard.

THE COURT: I have no hesitation in taking it at the appropriate time, but I would assume that you and your adversaries would agree with me that this is not the propitious time in light of the fact that you have just won one, so to speak, so that if the Third Circuit agrees with my reasoning on the first issue, the matter may be obviated, but my simple point is that until they dispose of the matter, I think we should hold back and at that appropriate time, at that time I think, Mr. Ridley, it would be appropriate to handle the matter, if you have not been able to work it out with your adversaries. Do you not agree, sir?

MR. RIDLEY: Yes, your Honor.

THE COURT: Fine.

MR. BECKER: We agree.

THE COURT: Fine.

Just mark it down, keep it in abeyance and keep on going before Judge Chesler, who is now handling the litigation.

Mr. Becker, have you had an opportunity to examine [17] the order which Mr. Ridley submitted and which I amended in accordance with my determination this afternoon?

MR. BECKER: Yes, your Honor. It's satisfactory.

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THE COURT: Fine. Then it's done.

Good afternoon, gentlemen.

(Matter concluded.)

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AMENDMENT TO ORDER

CRUMMY, DEL DEO, DOLAN
GRIFFINGER & VECCHIONE
A Professional Corporation
One Gateway Center
Newark, New Jersey 07102-5311
(201) 622-2235
Attorneys for Defendant
Hoffmann-La Roche, Inc.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 85-2138

RICHARD SPERLING, FREDERICK HEMSLEY and JOSEPH ZELAUSKAS, Individually, and on Behalf of All Other Persons Similarly Situated,

Plaintiffs,

vs.

HOFFMANN-LA ROCHE INC., a New Jersey Corporation,

Defendant.

AMENDMENT TO ORDER

(Hon. Harold A. Ackerman)

This matter having been opened to the Court upon the

application of Hoffmann-La Roche Inc., pursuant to 28 U.S.C. § 1292(b), for an amendment to this Court's Order of January 5, 1988 to certify for appeal certain rulings set forth in paragraphs 3 and 5 of said Order, and the Court having considered the merits of the application, and good and sufficient cause having been shown for the entry of this Order,

It is on this 25th day of January, 1988,

ORDERED that the motion of Hoffmann-La Roche Inc., pursuant to 28 U.S.C. § 1292(b), to certify for appeal certain rulings set forth in paragraph 3 ~~and 5~~ of the Court's Order of January 5, 1988 be, and the same is hereby granted, and the Court hereby certifies the following question as controlling question of law as to which there is substantial ground for difference of opinion and as to which an immediate appeal may materially advance the ultimate termination of the litigation:

1. In this case brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, where the joinder in the action of persons other than the named plaintiffs is governed by 29 U.S.C. § 216(b), does the District Court possess the authority to facilitate notice of the action to said persons who have not yet filed consents to join the action?

~~2. In this case brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, where the joinder in the action of persons other than the named plaintiffs is governed by 29 U.S.C. § 216(b), should the District Court have vacated the consents to join this action and issued corrective notice with regard to those persons who have heretofore filed consents to join this action in response to the letter of March 7, 1985, a copy of which is annexed hereto as Exhibit 1?~~

and, it is further

ORDERED that the transmission of notice pursuant to paragraph 3 of the Court's Order of January 5, 1988 be, and the same is hereby stayed, and said notice is not to be transmitted until such time as the United States Court of Appeals for the Third Circuit denies defendant's petition for certification pursuant to U.S.C. § 1292(b) or, if said petition is granted, until such time as the Court of Appeals affirms the rulings of this Court as embodied in paragraph 3 of said Order.

s/ Harold A. Ackerman

Harold A. Ackerman, U.S.D.J.

[Those portions crossed out were eliminated from the final order by the Honorable H. A. Ackerman.]

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R.A.D.A.R. PAPERS APPENDED TO FOREGOING ORDER

R.A.D.A.R.

ROCHE AGE DISCRIMINATEES ASKING REDRESS
P.O. BOX 1210
Secaucus, New Jersey 07094

March 7, 1985

Dear Former Roche Employee:

February 4, 1985 was "Black Monday" for hundreds of loyal employees of Hoffmann-LaRoche. With little regard for our careers, our personal and family needs, indeed our futures, Roche fired at least 1,000 of us, throwing our lives into disarray.

As the dust begins to settle, we have looked around to see who were the victims of this "Black Monday" massacre, and it is apparent that a disproportionately large number of us were over the age 40. We think this is age discrimination under the law and we are now preparing to bring a "class action" against Hoffmann-LaRoche under the Federal Age Discrimination in Employment Act. While our action is being taken on behalf of ourselves, we are hopeful and expect that other former employees may wish to join our group. Counsel is being retained to handle our case on a contingent fee basis. That means that the attorneys will receive no fee unless there is a recovery, whether by trial or settlement.

If we are successful in our suit, the law provides that we all may each receive money to compensate us for our economic loss, as well as other remedies.

If you were aged 40 or older at the time of your recent discharge,

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you may qualify to join (opt-in) our action. There is no cost to you to join us in this effort.

In order to join us, please sign the enclosed "Consent to Join Action" before any notary public and return it to us at the above address. All signed and notarized Consent forms received by us on or before May 5, 1985 will be included with our formal complaint to be filed in Federal Court. Don't wait, however, because after that date we cannot assure you that you can be a participant in our filing with the Court, although we will try.

If you have already filed a charge of age discrimination with a government agency, you must still sign a Consent form to join us.

In completing the Consent Form, we ask that you indicate your exempt salary grade level at termination and, if you were in exempt Grade 10 or below, whether your salary was at or greater than midpoint of the grade. If you are non-exempt and your base pay is at least $20,000, you are also a potential member of the Class.

While there will be no counsel fees to pay unless we are successful, our organization plans to bear ultimate responsibility for the costs and disbursements of maintaining this suit. To assist us in raising money, we have formed R.A.D.A.R. (Roche Age Discriminatees Asking Redress). A voluntary contribution from each person joining our case would be appreciated to help us defray these new expenses. For, unlike Hoffman-LaRoche, we do not have unlimited financial resources. If you wish to contribute, may we suggest that is be in the amount of $200.00, or whatever amount you are willing to contribute. A war chest for litigation expenses such as expert witnesses, transcripts, photocopying and postage is essential if we are to stand up to Roche. Make your check payable to R.A.D.A.R. We understand that these payments will

be tax deductible. As we said before, however, you do not have to contribute to join us.

One more thing - there is strength in numbers. Please help us to locate other members of our famous "Operation Throw 'Em Out" class. Using the attached form, send us names, addresses, telephone numbers and ages, if known, or other former "over 40" Roche employees known by you to have been terminated from February 4, 1985 to date. We also welcome anyone who wishes to help out and participate in RADAR's activities.

We are very optimistic about this suit. Some of you may have questions and we will be happy to answer them. Write to us c/o R.A.D.A.R. at the above listed P.O. Box or call one of us at the telephone numbers set forth next to our names. Please observe the calling times note.

Please join us!

Sincerely yours,

RICHARD SPERLING, 256-1525
(Mon. to Fri. 5:00 to 6:15 pm.)

DAVID WAGNER, 472-3564
(Tues. & Wed. 9:00 to 11:30 a.m.)

RAYMOND ANTELMAN,
779-2322
(Daily Evenings)

CARL R. GARDNER, 667-4889
(Mon. 9:00 to 11:00 a.m.)

FREDERICK H. HEMSLEY,
998-8786
(Mon. 6:30 to 9:30 p.m.)

JAMES AXAM, 777-6894 &
779-9278
(Thurs. 7:00 to 9:00 p.m.)

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OTHER FORMER ROCHE EMPLOYEES

1. _____ _____
NAME AGE (IF KNOWN)

_____ _____
ADDRESS TEL. NO.

2. _____ _____
NAME AGE (IF KNOWN)

_____ _____
ADDRESS TEL. NO.

3. _____ _____
NAME AGE (IF KNOWN)

_____ _____
ADDRESS TEL. NO.

4. _____ _____
NAME AGE (IF KNOWN)

_____ _____
ADDRESS TEL. NO.

5. _____ _____
NAME AGE (IF KNOWN)

_____ _____
ADDRESS TEL. NO.

6. _____ _____
NAME AGE (IF KNOWN)

_____ _____
ADDRESS TEL. NO.

COMMENTS: _____

_____

_____

Please use reverse side for additional names/comments.

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No.

CONSENT TO JOIN ACTION
(Pursuant to 29 USC 216(b))

RICHARD SPERLING, et als, individually and on behalf of all other persons similarly situated,

Plaintiffs,

-against-

HOFFMAN-LA ROCHE, INC.,

Defendant.

TO: THE CLERK OF THE COURT AND TO EACH PARTY AND COUNSEL OF RECORD:

STATE OF :

ss:

COUNTY OF :

_____ being duly sworn, deposes and says:

1. I reside at _____
I was born on _____, and was over

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the age of forty (40) years on _____, the date on which my employment with Hoffmann-LaRoche ("Roche") was involuntarily terminated.

(Check either 2 or 3):

_____ 2. As an exempt employee, my base salary level at the time of my termination was Grade _____. If Grade 10 or under, my actual salary _____ (was, was not) at or greater than the midpoint of the Grade.

_____ 3. As a non-exempt employee, my base pay at termination was at least $20,000.00 per annum.

4. I understand this suit is being brought under the Federal Age Discrimination in Employment Act. As a former employee of Roche, I hereby consent, agree and opt-in to become a party plaintiff herein and to be bound by any settlement of this action or adjudication of the Court.

5. I hereby authorize the named plaintiffs, or plaintiffs' counsel of record, to file this Consent with the Clerk of the Court along with the Complaint herein.

6. I hereby further authorize the named plaintiffs herein to select and retain such counsel as they shall determine, in their discretion, and for such counsel to make such further decisions with respect to the conduct and handling of this action, including the settlement thereof, as they deem appropriate or necessary.

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_____

(full signature - type or print name below the line)

Sworn to before me this
, day of
1985.

_____

Notary Public

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED JANUARY 5, 1988

FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 85-2138

RICHARD SPERLING, et al., individually and on behalf of others similarly situated,

Plaintiffs,

vs.

HOFFMANN-LA ROCHE, INC.,

Defendant.

OPINION

APPEARANCES:

Ben H. Becker, Esq.
Schwartz, Tobia & Stanziale
22 Crestmont Road
Montclair, New Jersey 07042

Leonard N. Flamm, Esq.
Hockert & Flamm
880 3rd Avenue
New York, New York 10022
(Attorneys for Plaintiffs)

Appendix C

John A. Ridley, Esq.
Richard S. Zackin, Esq.
Crummy, Del Deo, Dolan,
Griffinger & Vecchione
One Gateway Center
Newark, New Jersey 07102
(Attorneys for Defendant)

ACKERMAN, District Judge

This is a putative class action brought by former employees of defendant pharmaceutical company, on behalf of themselves and others similarly situated, alleging violations of the federal Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621 *et seq.* (the "ADEA"), the New Jersey Law Against Discrimination, N.J.S.A. §§ 10:5-1 *et seq.* (the "LAD"), and the New Jersey common law of contracts. Before me now are a number of motions on which U.S. Magistrate G. Donald Haneke has filed reports and recommendations ("R&R's"). Plaintiffs have objected to most of the Magistrate's recommendations, and defendant has objected to the remainder. Therefore, I must now make a *de novo* review of each of these matters. *See* 28 U.S.C. §§ 636(b)(1)(B) and (b)(1)(C); Local Rule 40.D.5; *see also Henderson v. Carlson*, 812 F.2d 874, 878-79 (3d Cir. 1987). I note in the alternative that even if some of these matters are properly considered nondispositive under 28 U.S.C. § 636(b)(1)(A), they all concern questions of law only, and therefore are subject to plenary review by me. *See* 28 U.S.C. § 636(b)1)(A); Local Rule 40.D.4.

Also before me is a request by plaintiffs that discovery be allowed to go forward. The Magistrate stayed all discovery by plaintiffs when he received the referral of motions for report and

recommendation. Defendant has been permitted to conduct discovery on a single issue only. Whether I view plaintiffs' request as a timely appeal from the Magistrate's most recent discovery decision, which was filed on May 6, 1987 and ordered that the discovery stay continue until I issued my decision on the R&R matters, or as a new request made directly to me, to be decided in the context of my other decisions today, I find that plaintiffs' request is properly before me.

I. BACKGROUND

Before specifying exactly which issues require my consideration, I shall briefly recount the factual background to and procedural history of this case. On February 4, 1985, defendant allegedly fired or demoted about 1,200 employees as part of a systematic reduction in force, or "RIF," executed in furtherance of a company program which defendant called "Operation Turnabout." In the following months, Richard Sperling, Frederick Hemsley, and Joseph Zelouskos, the 3 named plaintiffs in this case, took the necessary procedural steps to file an ADEA action in this court. Plaintiffs' original complaint, filed on May 7, 1985, charged as its first count that defendant had violated the rights under the ADEA of a defined class of employees. Count 2 charged defendant with ADEA violations against the named plaintiffs only. Count 3 charged defendant with violating the rights under New Jersey's LAD of the named plaintiffs and the defined class. On July 3, 1985, plaintiffs filed an amended complaint which added a 4th count, asserting violations of New Jersey contract law by defendant against the named plaintiffs and the defined class.

At the time the case was filed, and up until late 1986, the case was assigned to then Chief Judge Clarkson Fisher. During

that time, each side in the case made a number of motions. These motions concerned the following issues: the propriety of notice from the court to potential class members, the dismissal of certain claims, class certification, the legal propriety of earlier communications by plaintiffs and their counsel with putative class members, and discovery. Judge Fisher referred the motions to Magistrate Haneke for decision, or in the case of dispositive motions, for report and recommendation. The Magistrate suspended all discovery by plaintiffs pending decision on the motions, but did allow defendant to conduct discovery on a single limited issue.

The Magistrate filed his initial Report and Recommendation on February 6, 1987. As the newly assigned judge on the case, that R&R came to me. I remanded the matter to the Magistrate for fuller discussion. On May 5, 1987, the Magistrate issued a supplemental Report and Recommendation, more fully explaining the reasoning behind his recommendations regarding the parties' outstanding motions. On May 6, 1987, the Magistrate filed an additional Report and Recommendation, which addressed a motion by plaintiffs to equitably toll the statute of limitations for putative class members who had not yet joined Count 1. The tolling motion had been filed soon after the case was reassigned to me, and I had referred it to the Magistrate, who at that time had yet to produce his supplemental R&R. On that same day, May 6, 1987, the Magistrate also issued a decision reasserting his stay of discovery in the matter, until the issues addressed in his R&R's were finally resolved by an order from me.

Between them, the two sides objected to each of the Magistrate's recommendations, thus bringing before me for *de novo* review all the issues considered by the Magistrate except the issue of the stay of discovery, which as I have previously

explained I find to be before me as either a timely appeal or as a new request made directly to me.

II. SUMMARY OF THE ISSUES

The issues before me may be summarized as follows. First, there are the issues related to Count One only. Count One states a claim under the ADEA on behalf of a defined class of allegedly injured employees. Plaintiffs moved for discovery from defendant of the names and addresses of all the employees fired or demoted in the February 4, 1985 RIF who fit within the definition of the class plaintiffs wish to represent on Count One, for the court to send out notice of the pendency of this action to whichever putative class members have not yet filed with the court a written consent to join the action, and for defendant to publish notice of the action in the company newspaper and post notice on company billboards. In requesting this relief, plaintiffs argued that they had already satisfied the special statutory requirements imposed under the ADEA for maintaining a class-wide ADEA claim. Defendant opposed plaintiffs' motions, and cross-moved to invalidate the written consents to join the action which had already been filed with the court and to have "corrective notice" sent out to those who had filed consents. Plaintiffs eventually filed an additional motion to equitably toll the statute of limitations on Count One for those putative class members who had not yet joined the action. In reviewing all these motions, the Magistrate concluded that there was no basis in the record at that point for deciding that Count One could be maintained as an ADEA class claim. He recommended that the consents already filed be invalidated, that employees who had already consented be sent, under court supervision, "corrective notice" regarding the action, that the court send notice to no other employee, that the requests for posting and publication be denied, and that the equitable tolling

motion be denied at this time. The Magistrate also kept his discovery stay in place, rejecting plaintiffs' request for discovery regarding the names and addresses of all the RIF'ed employees who fit the definition of the class plaintiffs wished to represent. Before me, plaintiffs renew all their requests, and defendant renews its requests.

Second, there are the issues related to Counts One, Two and perhaps Three. Count One states the ADEA class claim, while Count Two states the individual ADEA claims of the named plaintiffs. Count Three states a pendent state LAD claim on behalf of the named plaintiffs and the same class defined by plaintiff under Count One. Defendant moved to dismiss all age discrimination claims sounding in a "disparate impact" theory. I note that although defendant premises its disparate impact arguments on federal-law citations only, defendant never expressly limits those arguments to the federal age claims only. Conceivably, defendant intends to attack Count Three allegations sounding in a disparate impact theory as well as allegations in Count One and Two. The Magistrate recommended denying the motion as premature. Defendant renews its request before me.

Third, there are the issues related to Counts Three and Four. Count Three states a pendent state LAD claim on behalf of the named plaintiffs and the class defined by plaintiffs under Count One. Count Four states a pendent state contract claim on behalf of the named plaintiffs and the class defined by plaintiffs under Count One. Plaintiffs moved to certify the classes under Counts Three and Four in accordance with Fed.R.Civ.P. 23 and to have the court notify class members of the claims and of their right to exclude themselves by notice to the court. Defendant moved to dismiss Count Four under the discretionary principles of pendent jurisdiction, and additionally opposed class certification on both

Counts. The Magistrate recommended that Count Four be dismissed under the discretionary principles of pendent jurisdiction, or alternatively, if jurisdiction was not declined, that Rule 23 certification be denied on that count. He also recommended that Rule 23 certification be denied as to Count Three. Before me, both sides renew their respective requests.

Finally, there is plaintiffs' request that discovery go forward.

I have summarized the issues before me on a claim-by-claim basis. I shall now consider them in a somewhat different organization, so as to simplify the tangled interconnections which have grown up among them. This tangle must be attributed in some part to the complexity of the issues themselves, but in larger part it derives from the extraordinarily overlong and convoluted briefing in which the parties have wrongly been allowed to indulge.

III. DISPARATE IMPACT

Defendant moves under Fed.R.Civ.P. 12(b)(6), and alternatively under Fed.R.Civ.P. 56, to dismiss any age discrimination claims made by plaintiffs which are premised on a theory of "disparate impact." *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (racial discrimination under Title VII); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) (racial discrimination under Title VIII); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (sex discrimination under Title VII). *See also Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981) (applying disparate impact theory to ADEA age discrimination claims); *Lusardi v. Xerox Corp.*, Civil No. 83-809, slip op. at 28-29 (D.N.J. November 5, 1987) (stating that disparate impact theory applies under the ADEA). But *see Markham v. Geller*, 451 U.S. 945, 947 (1981) (Rehnquist,

J., dissenting from denial of certioriari) (arguing that disparate theory is inapplicable to ADEA claims).

Defendant purports to save for another day the argument that, no matter what the set of facts, disparate impact theory cannot apply in age discrimination actions. *See, eg.*, Defendant's Brief on Disparate Impact prepared for March 24, 1986 return date, at page 4 note 2. At this point, defendant argues merely that disparate impact cannot be invoked in the case at hand. The thrust of defendant's argument is that disparate impact analysis is applicable only in the case of a facially age-neutral, "single, discrete condition of employment, mechanically applied, which has a statistically significant adverse impact" on a protected group, defendant's brief, cited supra, at page 3, and that the Operation Turnabout RIF was no such condition.

It is clear to me that defendant's discriminatory impact motion must be denied at this time. First, defendant's motion cannot be granted under 12(b)(6). At this point in the case, defendant has reserved any argument that disparate impact theory is generally inapplicable in age discrimination suits. And, if one assumes the propriety of disparate impact analysis for the sake of argument, *see Massarsky v. General Motors, Corp.*, 706 F.2d 111, 120 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983), and even the propriety of the specific disparate impact definition asserted by defendant, it is not beyond doubt that plaintiffs could not prove a set of facts which would establish that defendant committed a disparate impact violation. *See, e.g., Conley v. Gibson*, 355 U.S. 41, 45-46 (1975). It would be consistent with plaintiffs' pleadings, for example, if defendant in fact fired people based on the size of their salaries, *see Geller v. Markham*, 635 F.2d at 1030, or on the number of years they spent developing expertise in one technical area to the exclusion of others, *see Blum v. Witco Chemical Corp.*,

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829 F.2d 367, 371-72 (3d Cir. 1987), and by so doing caused the termination or demotion of an unacceptably high percentage of older workers.

Second, defendant's motion cannot be granted under Rule 56. The crux of defendant's argument on this motion is made out in the thick affidavits which defendant filed in support of its contention that the Operation Turnabout RIF involved complciated, subjective, multifactored judgments about which employees to fire, which to demote. These detailed factual submissions are necessary to defendant's argument, because that argument turns on a claim about how, in fact, the "Operation Turnabout" RIF worked. For reasons which remain puzzling to this court, however, plaintiffs have not been allowed one whit of discovery to aid them in challenging defendant's version of how, in fact, the RIF worked. Under Rule 56(f), I find that any summary judgment motion which purports to turn on a factual description of decisionmaking in the RIF must await a time when plaintiffs have received a decent opportunity to conduct their own discovery regarding that decisionmaking. *See Sames v. Gable*, 732 F.2d 49, 51-52 (3d Cir. 1984); *see also J.E. Mamiye & Sons, Inc. v. Fidelity Bank*, 813 F.2d 610, 618-19 (3d Cir. 1987) (Becker, J., concurring) (arguing that "the timing issue" governed by Rule 56(f) has taken on greater importance in light of the recent opinions of the Supreme Court in *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986), and *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986), concerning the proper standards for summary judgment).

For all these reasons, defendant's disparate impact motion must be denied, without prejudice.

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IV. THE ADEA CLASS

In Count One, plaintiffs seek relief under the ADEA on behalf of a class of employees which is a subgroup of all the employees terminiated or demoted in the February 4, 1985 RIF.

In most federal class actions, including those involving racial and sex discrimination, the issues of joinder among, and notice to, potential class members are governed by Fed.R.Civ.P. 23. Class claims brought under the ADEA, however, are different. Section 7(b) of the ADEA, 29 U.S.C. § 626(b), incorprates certain select provisions of the federal Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, to establish the "powers, remedies, and procedures" by which the ADEA is to be enforced. One of these provisions, 29 U.S.C. § 216(b), provides for class actions as follows:

> An action to recover the liability prescribed . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

Thus it has generally been held that ADEA class actions may proceed under 29 U.S.C. § 216(b) only, and not under Rule 23. *See, e.g., LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 289 (5th Cir. 1975); Lusardi v. Xerox Corp., 99 F.R.D. 89, 92 (D.N.J. 1983), *app. dismissed*, 747 F.2d 174 (3d Cir. 1984); and cases

cited in *Lusardi*, 99 F.R.D. at 92. Or, as it has otherwise been expressed repeatedly, § 216(b) creates an "opt-in" mechanism for class formation and Rule 23 creates an "opt-out" mechanism, and, in the case of the ADEA, the incorpration of the former prohibits application of the latter. *LaChapelle*, 513 F.2d at 289; *Lusardi*, 99 F.R.D. at 92. *See* cases cited in *Lusardi*, 99 F.R.D. at 92. I note that courts commonly employ terms such as "class" and "certification" when discussing § 216(b) claims, even though such terms are hallmarks of Rule 23 litigation and are not mentioned in § 216(b). *See, e.g., Lusardi*, 99 F.R.D. at 93. Whatever nomenclature is used, however, it is clear that the maintenance of ADEA representative claims, and the maintenance of Count One in this case, is governed by § 216(b) and not Rule 23.

As the district court noted in *Lusardi*, slip op. cited *supra*, at 19, it is clear on the face of § 216(b) itself that an ADEA plaintiff may "maintain" a suit on behalf of other employees once two conditions are met. First, the named plaintiffs and the other employees must be "similarly situated" and second, the other employees must file written consents to join the action. The courts have applied § 216(b) in a manner which supports this view of the statute. *See, e.g., Frank v. Capital Cities Communications, Inc.*, 88 F.R.D. 674, *amended on other grounds*, 509 F. Supp. 1352 (S.D.N.Y. 1981); *Plummer v. General Electric Co.*, 93 F.R.D. 311 (E.D. Pa. 1981).

Under these principles of § 216(b), I must decide the issues described earlier as "relating to Count One only." The parties' dispute regarding these issues began when plaintiffs moved for discovery of the names and addresses of all the employees who fell within the definition of the class plaintiffs sought to represent, for notice from the court to absent class members regarding the existence of this action, and for the posting and publication of

notice on defendant's premises. I shall begin my analysis with these motions.

1. Court Facilitation of Notice to the Class

The class of employees which plaintiffs seek to represent on Count One is defined by plaintiffs, in their pleadings and other papers, as follows:

> All persons, male and female, in the present or former employ of the Company, now or hereafter executing and filing written consents to participate and join in this action, pursuant to 29 USC 216(b), who were, at any time from on or about January 1, 1985 to date:
>
> (a) over 40 but less than 70 years of age;
>
> (b) employed by HLR at any of its locations nationwide in a non-union position or a position not subject to a collective bargaining agreement;
>
> (c) (1) if an exempt employee (i) with an HLR salary grade level of 10 or above, or (ii) if below an HLR salary grade level of 10, with a base annual salary at or greater than the midpoint of such salary grade level, or (2) if a non-exempt employee, with a base annual salary of at least $20,000;
>
> (d) involuntarily discharged, laid off, terminated, downgraded or demoted from employment by HLR:

> (e) subjected to such adverse employment actions as described in (d) pursuant to or in connection with a staff reduction action and/or layoff implemented by HLR on or about February 4, 1985.

At the present time, roughly 400 employees have filed with the Clerk of this Court written notices of their consent to join the action. Perhaps 1,200 people all told were fired or demoted; plaintiffs belief that up to 600 may fit the class they wish to represent. Plaintiffs seek discovery against defendant and the posting and publication of notice on defendant's premises in order to find those missing class members, if any. Once they are found, plaintiffs want the court to notify them of this action and provide them with opt-in forms.

In *Lusardi,* the district court decided to send written notice from the court to absent members of a class that eventually numbered more than 1,300. 99 F.R.D. at 93, *see also* the more recent slip opinion in that case cited *supra,* at 19. The defendant in that case then attempted an immediate appeal of the notice decision under the collateral-order doctrine. *Lusardi v. Xerox Corp.,* 747 F.2d 174 (3d Cir. 1984). The Third Circuit dismissed the appeal, but noted in dictum that the notice issue was "novel and unresolved." 747 F.2d at 176. In addition, the appeals court stated that:

> There is substantial support in the case law for Xerox' position that a district court may not authorize a class-based notice in an ADEA action. *See, e.g., Dolan v. Project Construction,* 725 F.2d 1263 (10th Cir. 1984); *Kinney Shoe Corp. v. Vorhes,* 564 F.2d 859 (9th Cir. 1977). But there

> is equally strong precedent supporting the district court's order authorizing notice to a conditional ADEA class. *See, e.g. Braunstein v. Eastern Photographic Laboratories, Inc.,* 600 F.2d 335 (2d Cir. 1978), *cert. denied,* 441 U.S. 944 (1979); *see also, Woods v. New York Life Ins. Co.,* 686 F.2d 578 (7th Cir. 1982); *Allen v. Marshall Field & Co.,* 93 F.R.D. 438 (N.D. Ill. 1982). This court has not yet addressed the notice issue.

747 F.2d at 176.

Apparently, it was not a matter in dispute in Lusardi that plaintiffs could conduct discovery against defendant to identify missing class members. *See* 99 F.R.D. at 93 n.8. In the case at hand, the issue of discovery and the issue of posting and publication, as well as the issue of notice from the court, are in dispute. I consider the issues of discovery, posting and publication, and notice from the court to represent three aspects of an overarching issue: to what extent may a court offer the mechanisms of judicial process to aid ADEA class plaintiffs in filling their class with all its possible members? I shall decide the motions by plaintiffs now under discussion by considering this overarching issue. I take the Third Circuit's comments in *Lusardi,* quoted above, to apply with equal force to the overarching issue I have identified. Therefore, I shall start my consideration with a review of the divided case law, including cases cited by the Third Circuit in the *Lusardi* opinion.

I turn first to the cases opposing court involvement. In *Dolan v. Project Construction Corp.,* 725 F.2d 1263 (10th Cir. 1984), a Fair Labor Standards Act ("FLSA") case for unpaid compensation, brought as a representative action under § 216(b),

the Tenth Circuit prohibited "active assistance of plaintiff" by the court in contacting new class members. 725 F.2d at 1268. "Active assistance" included notice from the court and any discovery of names intended solely to facilitate the search for new class members. 725 F.2d at 1267 and note 4. The Tenth Circuit based its holding on its reading of the legislative history behind the most recent amendments to § 216(b), which predated passage of the ADEA itself, 725 F.2d at 1267-68; on its conclusion that missing class members cannot be bound by the result in an opt-in class litigation, and therefore will not be prejudiced by lack of notice, 725 F.2d at 1268; on its conclusion that without such prejudice due process did not require notice, 725 F.2d at 1269; and on its conclusion that requests to produce names and addresses are "often" great burdens on defendants, 725 F.2d at 1267.

In *Kinney Shoe v. Vorhes,* 564 F.2d 859 (9th Cir. 1977), another FLSA unpaid compensation case brought as a § 216(b) representative action, the Ninth Circuit prohibited notice by the court to absent class members and, apparently, any discovery of names and addresses intended solely to aid the search for new class members. 564 F.2d at 864. The court reasoned that Congress' selection of § 216(b) rather than Rule 23 in FLSA representative actions indicated an affirmative intent that procedures under Rule 23 be banned from FLSA representative actions, 564 F.2d at 862-64; that, apparently, even if Congress were neutral regarding notice under § 216(b), neither § 216(b) nor any other law gave courts the affirmative power to issue notice, 564 F.2d at 863-64; that due process did not require notice when the case was an opt-in action, 564 F.2d at 863; and that courts should avoid "stirring up" litigation, 564 F.2d at 863.

In *McKenna v. Champion International Corp.,* 747 F.2d 1211 (8th Cir. 1984), the Eighth Circuit decided in an ADEA case that

courts could neither send notice nor allow discovery of names and addresses. Although the court found "little light" in the legislative history of § 216(b), it did rely on the arguments, mentioned in regard to the other cases described above, that due process did not compel notice and that neither § 216(b) nor any other law expressly empowered courts to send notice, 747 F.2d at 1213-14. The court added that, given the comparatively intricate procedures with which plaintiffs must contend in certifying a Rule 23 class, plaintiffs in § 218(b) cases should not enjoy the "benefits of court-directed notice" without carrying the burden of Rule 23 pleading and proof, 747 F.2d at 1213. The court also noted that the existence of a "remedial purpose" in the FLSA and the benefit in avoiding a "multiplicity of suits" were on balance unpersuasive reasons to allow court notice, 747 F.2d at 1213-14. *See also, e.g., Goerke v. Commercial Contractors & Supply Co.,* 600 F. Supp. 1155, 1158-61 (N.D. Ga. 1984) (courts have no power to send notice or approve notice sent by others); *McGinley v. Burroughs Corp.,* 407 F. Supp. 903, 911 (E.D. Pa. 1975) (congressional intent that Rule 23 not be used includes an intent that "Rule 23 type notice" be prohibited).

On the other hand are cases approving of varying degrees of court facilitation of ADEA class formation. In *Braunstein v. Eastern Photographic Laboratories, Inc.,* 600 F.2d 335 (2d Cir. 1978), *cert. denied,* 441 U.S. 944 (1979), an FLSA action for compensation, a Second Circuit panel decided in a *per curiam* opinion that although due process does not require notice in an opt-in case, court-authorized notice would be allowed because, in light of the "broad remedial purpose" of the FLSA, it "makes more sense" to read the silence in § 216(b) on the notice issue as permitting notice "in an appropriate case," rather than as prohibiting notice; also, notice would help avoid a multiplicity of lawsuits, 600 F.2d at 336.

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The Seventh Circuit took a notable intermediate position on court involvement in *Woods v. New York Life Insurance Co.*, 686 F.2d 578 (7th Cir. 1982). *Woods* was an ADEA case brought as a representative action under § 216(b). The Seventh Circuit found there to be no legislative history behind § 216(b) which was "pertinent to the issue of notice," 686 F.2d at 581, and further found it to be "sufficiently unlikely that Congress, having created a procedure for representative actions, would have wanted to prevent the class representative from notifying other members of the class that they had a champion," 686 F.2d at 581. The court approved discovery against defendant to uncover unknown class members; approved notice by plaintiffs, without the involvement of the court or defendant, to newly discovered members prior to the filing of the suit; and required that notice by plaintiffs after the filing of the suit be regulated in manner and content by the court, after defendant has received an opportunity to be heard on the propriety of the notice. 686 F.2d at 580-81. The court forbade, however, any "judicial imprimatur" in the notice which might be construed as the court's "invitation" to join the suit. 686 F.2d at 581-82. See also Judge Eschbach's partial dissent in *Woods*, arguing that the decision whether or not to issue notice from the court directly should be left to the discretion of the trial judge. 686 F.2d at 582.

In *Allen v. Marshall Field & Co.*, 93 F.R.D. 438 (N.D. Ill. 1982), the district court found that the legislative history behind § 216(b) shed "no light" on the issue of whether silence on the notice issue should be read as prohibiting or permitting notice from the court. 93 F.R.D. at 441. Citing *Braunstein*, the court then found that the broad remedial purpose of the ADEA, 93 F.R.D. at 442, as well as the judicial economies presented by the joinder of lawsuits, 93 F.R.D. at 444, favored the transmittal of notice from the court.

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On the issue of discovery only, a recent district court case from within this circuit, *Vivone v. Acme Markets, Inc.*, 105 F.R.D. 65 (E.D. Pa. 1985), supports the use of discovery to uncover the identities of missing class members. The court found that "implementation" of the ADEA, "a remedial statute," supported the "mixed" use of such discovery to prove the pattern or practice claims of the current plaintiffs and to find new plaintiffs. 105 F.R.D. at 68. The court also found that a request for certain routine employment information on all employees occupying certain job categories over a three-year period, a group estimated at less than 280 people, was not burdensome. 105 F.R.D. at 67-68. *See also, e.g., Lusardi*, 99 F.R.D. at 93 (notice from the court); *Johnson v. Amercan Airlines, Inc.*, 531 F. Supp. 957 (N.D. Tex. 1982) (notice from the court); *Monroe v. United Air Lines, Inc.*, 90 F.R.D. 638 (N.D. Ill. 1981) (letter notice from plaintiffs ending with the line: "This notice has been authorized by Honorable Milton I. Shadur, the judge to whom these cases are assigned."); *Riojos v. Seal Produce, Inc.*, 82 F.R.D. 613 (S.D. Tex. 1979) (notice from the court).

After careful consideration of these cases and the arguments they raise, I find that it is permissible for a court to facilitate notice of an ADEA suit to absent class members in appropriate cases, so long as the court avoids communicating to absent class members any encouragement to join the suit or any approval of the suit on its merits.

I start my analysis with § 216(b) itself, which is wholly silent on the issue of notice and court involvement. Turning next to the legislative history of § 216(b), I find it similarly silent on the issue, at least as it might relate to the case at hand. The version of § 216(b) now in effect was created by amendments to the FLSA passed in 1947. Cases such as *Dolan* rely on the legislative history

of the 1947 amendments to support a restrictive view of court involvement. I disagree with such assessments. The legislative history of the 1974 amendments consists of House Report No. 71 of the 80th Congress, 1st Session. *See* 1947 U.S. Code Congressional Service (80th Cong., 1st Sess.) 1029. That report expressly divides itself into two "parts." 1947 U.S. Code Congressional Service at 1029. The second part concerns "all" FLSA actions but relates only to statute-of-limitations, good-faith defense, settlement, and damages issues. 1947 U.S. Code Congressional Service at 1035-36. The first part discusses only "certain claims, actions, and proceedings concerning alleged wages and overtime compensation," especially the "portal-to-portal" actions which had been authorized the year before by the U.S. Supreme Court in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). 1947 U.S. Code Congressional Service at 1029-35. Because part 2 of the House Report does not concern itself with the issue of court involvement in notice to absent class members, and part 1 does not concern cases aside from portal-to-portal compensation cases, I find nothing in the legislative history of § 216(b) which might apply to the issue of court-facilitated notice, at least when it arises in a case other than a portal-to-portal compensation case. *See Woods*, 686 F.2d at 581; *Allen*, 93 F.R.D. at 441-42.

I next move beyond § 216(b) to the ADEA itself, which, as the statute incorporating § 216(b) and creating the claim at issue here, might add its own instructions as to how the notice issues in this case should be decided. *See, e.g., Vivone*, 105 F.R.D. at 69 (in ADEA class action, court reads the limits of § 216(b) in light of the special characteristics of ADEA claims). Although the legislative history of the ADEA is silent on these issues, it is clear to me that the ADEA is a remedial statute, which as a matter of traditional interpretative theory, should be broadly

construed to effectuate its general purpose: ameliorating age discrimination in employment. *Holliday v. Ketchum, McLeod & Grove, Inc.*, 584 F.2d 1221, 1229-30 (3d Cir. 1978) (*en banc); Bonham v. Dresser Industries, Inc.*, 569 F.2d 187, 193 (3d Cir. 1977). *See Oscar Meyer & Co. v. Evans*, 441 U.S. 750, 765-66 (Blackman, J. concurring); *see also Ricks v. Delaware State College*, 605 F.2d 710, 712 (3d Cir. 1979), *rev'd on other grounds*, 449 U.S. 250 (1980) (noting the "common humanitarian and remedial purpose" of the ADEA and Title VII). See generally Singer, Sutherland Statutory Construction, §§ 60.01 *et seq.* (4th ed.).

Given this conclusion, I find that the ADEA itself, consistent with the otherwise silent § 216(b), generates a capacity for courts to facilitate notice to absent ADEA class members. If courts refrain from facilitiating notice to missing class members, the enforcement of ADEA remedies for violations which victimize a group of people will be limited only to those victims who are already known to their "champion," *Woods*, 686 F.2d at 581, or who are fortunate enough to hear and heed "the vagaries of rumor and gossip," *Lusardi*, 99 F.R.D. at 93, or who are courageous enough to recognize the wrong done them and sue on their own. The ADEA cannot tolerate the piecemeal remediation which would thereby result, at least in those instances where the discriminatory act has victimized a large number of people. I note that even if § 216(b) does contain some restrictive Congressional intent regarding court-facilitated notice which I have failed to perceive, the applicability of that intent in ADEA cases is best discerned through the prism of the incorporating statute, the ADEA, and its general remedial goals. Therefore, even in this alternative situation some degree of court involvement in notice efforts would comport with the applicable statutory purposes.

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In addition to the statutes involved and their legislative histories, it is clear to me that the general policy of judicial economy also supports some role for the courts in facilitating notice to an ADEA class. Such notice can obviously aid courts in collapsing a potentially high number of separate ADEA suits into one case. Policies against barratry or champerty are not to the contrary. *See, e.g., Braunstein,* 600 F.2d at 336; *Lusardi,* 99 F.R.D. at 93; *Johnson,* 531 F. Supp. at 959-60. I would indeed presume that any aid a court might lend to an ADEA notice effort should not in any instance go beyond the constraints on commercial speech under which lawyers must in all cases operate. *See,* e.g., Rule 6 of the General Rules of this district, incorporating the American Bar Association Rules of Professional Conduct; Rules 7.1 and 7.2 of the ABA Rules; *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 642-43 (1985).

For all these reasons I find that courts may facilitate notice to absent class members in appropriate ADEA actions. For the reasons given in my foregoing analysis, I reject all the arguments to the contrary offered in the cases disfavoring court involvement.

Turning to the case at hand, I find it to be appropriate for this court to offer some degree of facilitation to plaintiffs' notice efforts. First, plaintiffs contend that up to 600 victims of defendant's alleged discriminatory RIF may exist, about 200 of whom are still unknown to plaintiffs and have not opted in. I shall order defendant to comply forthwith with plaintiffs' request for discovery of names and addresses in order to aid the effort to contact these unknown people. I note that defendant has not made known to me any objection it might have to the burden this discovery might impose. *See Vivone,* 105 F.R.D. at 67-68 (request for routine personnel-file information on perhaps 280 employees is not burdensome).

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I turn now to the issue of whether the court itself should issue the notice that will go out should absent class members be discovered. On this issue, I find instructive that part of the opinion of the Seventh Circuit in *Woods* which discusses the dangers inherent in courts placing their "imprimaturs" on notices sent out in opt-in class actions. Certainly, the reasons I have given in support of court facilitation of ADEA notice do not necessarily require that notice issue from the court itself; instead, plaintiffs or plaintiffs' counsel can put their names on the notice and still achieve the primary purposes behind notice: ensuring effective ADEA enforcement and fostering judicial economy. I note in passing that defendant has not seriously argued that plaintiffs themselves can or should be prohibited from communication with absent class members. *See, e.g., Dolan,* 725 F.2d at 1268-69 (citing, *inter alia, Gulf Oil Co. v. Bernard,* 452 U.S. 89 (1981)); *Vivone,* 105 F.R.D. at 67; *see also Rodgers v. U.S. Steel Corp.,* 508 F.2d 152, 163-65 (3d Cir.), *cert. denied,* 423 U.S. 832 (1975).

At the same time, however, it does serve the purposes of judicial economy for the court to specify the content of the notice, so that further arguments regarding the propriety of the notice can be avoided and the court can fairly require that after such notice is given a final deadline for consents be imposed. Once the court has specified the content of the notice, however, it would be unfair, if not a genuine infringement of plaintiffs' free-speech rights, to, in effect, put words in the mouths of plaintiffs or plaintiffs' counsel without indicating the court's involvement in the preparation of the notice.

In the case at hand, I shall resolve these countervailing positions by allowing notice to go out from plaintiffs or plaintiffs' counsel, with a content specified by me. The notice shall indicate that this court has authorized the notice without in any way judging

the merit of plaintiffs' claims or defendant's defenses. *See Monroe*, 90 F.R.D. at 641-42 (court approved sending of notice from plaintiffs which ended: "This notice has been authorized" by the court). In reaching this conclusion, I endorse and rely upon Judge Eschbach's partial dissent in *Woods*, which argued that the decision whether or not, in a specific case, to allow notice from the court or instead to employ some more tempered alternative is a "detail" which should be left to the discretion of the trial judge. 696 F.2d at 582. *See also, e.g., Riojas*, 82 F.R.D. at 619 (notice from the court itself was sent to class, but apparently a special need for such notice was shown because class members were migrant workers whose poverty and education left them with "no conception of legal rights they might possess").

The notice I authorize is contained in Appendix A of this opinion. Unless plaintiffs agree to a shorter deadline, I shall impose a cutoff date for new consents 45 days after plaintiffs send out this notice in the mail.

Finally, I turn to plaintiffs' request that notice be posted on "company bulletin-boards" on defendant's premises and published in defendant's "company newspapers." Given plaintiffs' allegation that defendant both fired and demoted employees in a discriminatory manner on February 4, 1985, notice of this sort would presumably aid in ensuring that all prospective class members learned of this action. Plaintiffs have not, however, posed their request with sufficient specificity, or presented specific facts regarding the existence of "company" bulletin boards and newspapers, such that I may fairly order defendant to comply. Plaintiffs' request is too vague; if plaintiffs return with a more specific request, stating where exactly and when posting should be ordered, and in which newspapers, in what sort of format, and when publication should be ordered, I shall consider it.

Plaintiffs can gather whatever information they need through regular discovery channels, which, as I shall explain more fully later in this opinion, are now to be reopened.

In short, I have decided that defendant must honor plaintiffs' discovery request for names and addresses forthwith, that notice by mail as contained in Appendix A of this opinion shall be allowed to go out bearing plaintiffs' or plaintiffs' counsel's names, and that the notice shall note that it has been authorized by the court. Plaintiffs' request for notice by posting and publication on defendant's premises is denied without prejudice because it is too vague.

I note that two of the reasons Magistrate Haneke gave for recommending that all of plaintiffs' notice and notice-related discovery motions be denied were that, under § 216(b), plaintiffs had failed to make a sufficient showing that all class members were similarly situated to the named plaintiffs, and also that the written consents so far filed with this court were flawed and should be invalidated. (As I discussed earlier, the only two requirements for maintaining a § 216(b) class action are that class members be similarly situated and that each absent class member file a consent to join the action.) I find neither of these two points sufficient to justify a denial of plaintiffs' discovery and notice motions.

2. The "Similarly Situated" Requirement

First, I discuss the "similary situated" issue. On this point, plaintiffs need show only "that their positions are similar, not identical," to the positions held by the putative class members." *Riojas*, 82 F.R.D. at 616 (*citing Calabrese v. Chiumento*, 3 F.R.D. 435, 437 (D.N.J. 1944)).

It seems clear from the language of § 216(b) alone that a § 216(b) representative action cannot be "maintained" unless all the employees represented are "similarly situated." The use of the word "maintained" in the statute, however, begs the question as to when in a specific case a determination of "similar situations" should be made. That question may not be important in all ADEA cases, but it is in this case, for plaintiffs have sought court assistance in filling their ADEA class, and thus are seeking orders in support of the maintenance of their class claim before the class is fully assembled for court inspection. In light of this problem, the Magistrate apparently concluded that a "similarly situated" determination had to be made at the outset of the litigation, and after examining the record in its nascent form and finding that plaintiffs had failed to carry their burden (whatever he felt it to be) on the issue, he denied their notice and notice-related discovery motions. I reach a different conclusion.

It is clear from a review of the "similarly situated" caselaw that the issue of when the determination must be made has not received extended consideration. A determination as to whether class members are similarly situated is always fact-specific. *See, e.g., Bean v. Crocker National Bank*, 600 F.2d 754 (9th Cir. 1979); *Lusardi*, slip op. *cited supra*, at 20; *Owens v. Bethelehem Mines Corp.*, 39 F.E.P. Cases 782 (S.D. W.Va. 1985); *Behr v. Drake Hotel*, 586 F. Supp. 427 (N.D. Ill. 1984); *Frank v. Capital Cities Communications, Inc.*, 33 E.P.D. Paragraph 34, 285 (S.D.N.Y. 1983); *Allen v. Marshall Field & Co.*, 93 F.R.D. 438 (N.D. Ill. 1982; *Franci v. Avco Corp.*, 538 F. Supp. 250 (D. Conn. 1982). *Plummer v. General Electric Co.*, 93 F.R.D. 311 (E.D. Pa. 1981); *Sussman v. Vornado, Inc.*, 90 F.R.D. 680 (D.N.J. 1981); *Locascio v. Teletype Corp.*, 74 F.R.D. 108 (N.D. Ill. 1977); *Cavanaugh v. Minneapolis Aquatennial Ass'n.*, 82 Lab. Cas. Paragraph 33,558 (D. Minn. 1976); *Burgett v. Cudahy, Co.*, 361 F. Supp. 617 (D.

Kan. 1973). Nevertheless, only a few courts have bothered to explain how much of a factual record they required before they would decide the issue. *See Haynes v. Singer Co.*, 696 F.2d 884, 887-88 (11th Cir. 1983) (not error for district court to decline to circulate notice of FLSA class claim when only evidence of widespread violation was counsel's unsupported assertions); *Locascio*, 74 F.R.D. at 112 (a one-day layoff alleged; court found plaintiffs to be similarly situated based on a reading of plaintiffs' complaint, bolstered by defendant's answers to interrogatories, which confirmed use of "uniform group of rules" for all layoffs); *Sussman*, 90 F.R.D. at 684 (termination scheme running from 1976 to 1977; court found plaintiffs to be similarly situated based on "undisputed facts" regarding the dates when employees departed, plaintiffs' allegations of discriminatory intent, and the subsequent hiring of younger employees); *Frank*, 33 E.P.D. at page 33,084-85 (defendants alleged a "subtle" campaign of harassment through various means, over an extended period of time, against employees in varied jobs in three states; court allowed case to proceed as a class action but reminded plaintiffs that they must prove at trial the existence of a single discriminatory policy touching all plaintiffs in order to "have justified their treatment as a class"); *Wilson v. Babcock & Wilcox Co.*, No. 82 Civ. 5685 (CES), slip op. at 4-5 (S.D.N.Y. April 27, 1983) (a discriminatory RIF alleged; court-authorized notice would not be circulated until plaintiff "at least has a *prima facie* case" against defendant, which plaintiff had not presented by relying on allegations in complaint when defendant presented affidavits contesting those allegations); *Lusardi*, 99 F.R.D. at 93 and slip op. *cited supra*, at 20 (allegation of nationwide discriminatory policy operating over four years; court "conditionally" certified class for notice and discovery purposes, then de-certified class after discovery revealed 75 RIFs covering over 17 separate organizations within defendant corporation); *Cavanaugh*, 82 Lab. Cas. at pages 47,924-25 (FLSA

wage compensation case; court should wait until all interested employees have filed consents before deciding "similarly situated" issue).

In the case at hand, the issue of "similar situations" is in dispute. Plaintiffs have relied on their pleadings and on a number of affidavits, notably the joint affidavit of Frederick Hemsley and Joseph Zelauskas at paragraphs 10, 12, 13, 14, 17 and 19 and the affidavit of Richard Sperling at paragraph 11, to allege the existence of a discriminatory purpose or impact running through the Operation Turnabout RIF and uniting all members of their self-defined class with a common cause of their injuries. Defendant has in turn submitted affidavits in support of its argument that at least some of the individuals already in the case are not similary situated to the named plaintiffs.

I find, however, that notice to absent class members need not await a conclusive finding of "similar situations." To impose such a requirement would condemn any large class claim under the ADEA to a chicken-and-egg limbo in which the class could only notify all its members to gather together after it had gathered together all its members, and from which the class could escape only by refusing entry after some unpublicized cutoff date to additional class members who thereafter stumble upon the case by themselves. Such a scheme would of course violate the twin policies which I earlier found to support court participation in ADEA-class notice in the first place: broad ADEA remediation and judicial economy. In addition, to allow notice before the "similarly situated" issue is decided would insure that all possible class members who are interested are present, and thereby assure that the full "similarly situated" decision is informed, efficiently reached, and conclusive.

The question remains whether the record in this case on the "similarly situated" issue is sufficiently developed at this time to allow court-facilitated class notice. I find that it is. Plaintiffs have made detailed allegations in their pleadings, and have supported those allegations with affidavits which successfully engage defendant's affidavits to the contrary. Plaintiffs' allegations, as supported, describe a single decision, policy, or plan of defendant's, infected by a discriminatory aspect which led to the termination or demotion of every member of the class plaintiffs wish to represent, and the reallocation of responsibilities among the remaining, generally younger workers. I find that with these allegations, plaintiffs set forth with some factual support all the necessary elements of an ADEA class claim. *See Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 789 F.2d 253, 256-57 (3d Cir. 1986). Whatever the minimum requirements may be for alleging that class members are similarly situated so as to merit court-facilitated notice, I find that the case at hand meets those requirements.

In reaching less than a final decision on the "similarly situated" issue, I do not mean to intimate that the ultimate burdens plaintiffs must sustain on that issue are heavy, or that significant discovery must be undertaken to sustain them. Without pre-judging my eventual decision I wish to point out what I have perceived so far regarding the standards governing a conclusive finding of "similar situations."

The relevant statutes and caselaw do not prescribe clear rules for determining whether putative class members are similarly situated. *See Lusardi*, slip op. cited *supra*, at 19-20. In general, however, courts appear to require nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan infected by

discrimination. *Frank*, 33 E.P.D. at page 33,085; *Owens*, 39 FEP Cases at 784-85. See the fact situations at issue in *Bean*, 600 F.2d at 756 (RIF implementated over 4 months); *Owens*, 39 FEP cases at 783-84 (consolidation of two corporate divisions led to a RIF which at least ten employees complained of as discriminatory); *Allen*, 93 F.R.D. at 443 ("campaign" of discrimination by top management over 5 years); *Franci*, 538 F. Supp. at 252 ("massive" RIF executed over 3 years); *Plummer*, 93 F.R.D. at 312 (class members shared same company department, "similar" complaints of discrimination, and same requests for relief); *Sussman*, 90 F.R.D. at 682, 684 ("undisputed facts" showed that class members were forced out of company between 1976 promise of pension participation and effective date of their participation in 1977); *Locascio*, 74 F.R.D. at 112 (one large layoff on or about July 11, 1975); *Burgett*, 361 F. Supp. at 622 (all class members were (1) 60-65 years old, (2) long-time supervisory personnel, (3) fired and rehired at same time, for same reasons, (4) complaining of same injurious behavior, (5) seeking same relief). Contrast *Lusardi*, slip op. cited *supra* at 20 (class decertified due to, *inter alia*, "disparate factual and employment settings" of plaintiffs and the different defenses defendant had posed to different individual claims). In view of these apparent requirements, the victims of an allegedly discriminatory RIF have in dictum been called a "self-evident" class. *Frank*, 33 E.P.D. at page 33,084.

Whatever the proper standard may be for conclusively judging the "similarly situated" issue, however, it must be remembered that the "similarly situated" showing establishes nothing more than the right of plaintiffs to "maintain" a collective action. At trial, each individual plaintiff must bear his or her burden of proof as to each element of an ADEA claim. *See, e.g., Berndt*, 789 F.2d at 256-57. In the meantime, the "similarly situated" finding provides for unified trial preparation, prosecution, and defense

on what appears to be a single discriminatory decision motivating all the terminations and demotions at issue. *See, e.g., Owens*, 39 F.E.P. cases at 784; *Frank*, 33 E.P.D. at page 33,085; *Franci*, 538 F. Supp. at 225-26 (and cases cited therein). Finally, nothing would appear to prevent the court from modifying or reversing a decision on "similar situations" at a later time in an action, as new facts emerge. *See Lusardi*, 99 F.R.D. at 93 and slip op. cited *supra*, at 19. But *see Cavanaugh*, 82 Lab. Cas. at page 47,925 (no "warrant" for engrafting" onto § 216(b) procedure the Rule 23 practice of conditionally certifying a class).

Putting these preceptions aside, however, I do in any event find that plaintiffs have at this point made a sufficient showing on the "similarly situated" issue to merit court-facilitated notice at this time in the action.

3. The Validity of the Prior Consents

Second, I discuss the issue of whether the consents already filed in this action are flawed, and must be invalidated. In contrast to the Magistrate, I find defendant's arguments for invalidating the consents to be generally without merit, and I deny defendant's requested relief.

According to those undisputed facts so far presented in this case, the efforts of plaintiffs to form a class on their ADEA claim began within a month of the February 4, 1985 RIF. A group of putative class members formed a group called R.A.D.A.R. ("Roche Age Discriminatees Asking Redress") on or about March 2, 1985. On March 7, 1985, a letter was mailed out to an unstated number of terminated Roche employees on R.A.D.A.R. letterhead, signed by 6 putative class members, soliciting consents to join and monetary contributions to cover litigation expenses.

Attached to the letter was a document denominated "Consent to Join Action (Pursuant to 29 U.S.C. § 216(b))," which went on for 6 paragraphs and left blank spaces for the consenting employee's name, address, birthdate, age, salary, salary grade, and signature. The form was addressed to the Clerk of this court and bore the caption in this case. Later on, a newsletter, a press conference, and other publicity efforts were employed by plaintiffs to discover the names of additional class members. When new individuals were discovered, they were sent the March 7 letter and consent form. It is apparently not disputed that most or all of the approximately 400 consents filed so far in this action were filed after their signatories had received and read the March 7 letter.

Defendant voices a number of objections to the March 7 letter and argues that any consents filed as a result of solicitation through the letter are invalid as a matter of law. Defendant seeks an order voiding the consents on file and directing that a curative notice from the court and a new consent form be sent to each employee who filed a voided consent.

Neither party has cited to me any law regarding the proper meaning of "consent" within the context of a § 216(b) opt-in procedure, and I have found nothing directly on point. In a somewhat analogous context, however — the question of whether a law firm's client has effectively consented to representation by the law firm despite a conflict of interest on the law firm's part — the Third Circuit has described consent as "full and effective disclosure of all the relevant facts . . . sufficient to enable [the consenting party] to make an informed decision . . . ." *IBM v. Levin*, 579 F.2d 271, 282 (3d Cir. 1978). I will look for such disclosure and informed decisionmaking in deciding the validity of the consents in this case.

Defendant's first objection is that the March 7 letter and consent form fail to indicate that a person opting-in must believe himself or herself to be a victim of age discrimination. As a subsidiary point, defendant complains that the letter and form fail to explain that plaintiffs might try their case at least in part under a disparate impact theory. These are silly objections. First, defendant cites no authority, and I know of none, which makes a plaintiff's subjective belief in his victimization an element of an age discrimination claim. Defendant makes veiled accusations regarding Fed.R.Civ.P. 11, which require that plaintiffs and plaintiffs' counsel possess a reasonable basis in fact for the allegations made in their pleadings. If defendant feels that Rule 11 has been violated, defendant can make an appropriate motion for sanctions. In any event, I will not read that rule as creating some new essential element of subjective belief for every claim filed in federal court. Second, I find no harm caused by the failure of the letter and consent form to discuss disparate impact theory. Read together, the letter and form make clear that the named plaintiffs in the action would exercise their discretion to select counsel, and that anyone opting in would be bound by the results of counsel's efforts. If a solicited employee wished to know more about the details of plaintiffs' litigation strategy, he or she could have inquired initially by calling any one of the 6 letter signatories, all of whom listed their phone numbers. Certainly, for defendant to demand that opt-ins receive up-front detail regarding alternative theories of liability under the ADEA verges on the ludicrous.

Defendant's second objection is that the letter and form fail to alert opt-ins to the fact that defendant had denied any charges of age discrimination. I can think of few suppositions more likely to be entertained by a potential plaintiff on his own than the supposition that the potential defendant might oppose plaintiff's lawsuit. Express notice is hardly necessary. In any event, the clear

implication of the March 7 letter is that defendant would offer plaintiffs vigorous opposition.

Defendant's third objection has some degree of substance to it. Defendant complains that the letter and form fail to identify plaintiffs' counsel, or alert potential opt-ins to their right to pursue their claims separately with counsel of their own choice. Obviously, the selection of counsel, even in a civil case, is an important matter. As I noted earlier, however, the letter and form together make clear that R.A.D.A.R. had or would be selecting counsel at their discretion, and that the efforts of the R.A.D.A.R.-selected counsel would ultimately bind all opt-ins. Potential opt-ins seeking information regarding who that counsel might be could have phoned the letter signatories. In view of these facts, opt-ins who consented to join the action without knowledge of who would represent them did so with their eyes open. I reject defendant's related contention that the letter "implies that only through R.A.D.A.R.'s suit will one be able to obtain 'redress.' " Defendant's brief in support of motion to declare invalid and vacate consents, prepared for March 24, 1986 return date, at page 20. The letter does nothing of the kind; rather it argues that there is "strength in numbers" and makes no mention whatsoever of the legal validity or invalidity of separate actions. Defendant's third objection ultimately fails.

Defendant's fourth objection, that the letter does not disclose the fact that an opt-in may be obliged to participate in discovery, is too insubstantial to discuss at length. Defendant's fifth objection, that the letter does not disclose potential liability for costs, is not only insubstantial, *see Sussman v. Vornado, Inc.*, Civil No. 78-422, letter opinion of Judge Stern at page 3 (D.N.J. October 18, 1978), it also ignores the long paragraph in the March 7 letter explaining the many types of expenses which plaintiffs

must bear on their own and suggesting contributions of up to $200 each. This paragraph amply forewarned potential opt-ins that participation might be costly, even though it did not expressly mention the taxing of court costs. Defendant's sixth objection, that the letter and form did not adequately alert opt-ins to the legal effect which a judgment in this case would exert, is flat wrong. Paragraph 4 of the form states clearly that the opt-in consents "to be bound by any settlement of this action or adjudication of the court."

Finally, I wish to address generalized and related objections of defendant's, expressed obliquely in some of defendant's specific objections discussed above. The first is that the March 7 letter and consent form are flawed because plaintiffs' counsel helped write them, but did not disclose this fact in the letter. The second is that the letter and form are inflammatory. I see no harm in plaintiffs' counsel failing to reveal their participation in writing the letter and form, because I see no way that such nondisclosure could have misled readers. I find in fact that by sending out the letter over the signatures of class members, not lawyers, plaintiffs and plaintiffs' counsel avoided misleading readers. A letter from a lawyer inviting one to join an action may create false hopes of success, or dissuade one from engaging a disinterested professional for a second opinion. A letter from another nonlawyer, however, does neither. Indeed, it may prompt a reader to be especially careful in deciding whether to join, or prompt him to first seek out an independent opinion from a lawyer close at hand and outside the case. Thus, the failure to disclose plaintiffs' counsel's role did not affect the quality of the consent registered by each opt-in. To the extent that defendant implies that such activity on the part of plaintiffs' counsel is unethical, I find defendant's contention strained, and irrelevant to the consent issue. Similarly, because the letter came from plaintiffs and not plaintiffs'

counsel, whatever inflammatory language the letter might have used did not effect the validity of the consents. In the use of such phrases as " 'Black Monday' massacre," "war chest" and "Operation Throw 'Em Out,' " the overall effect of the letter and form is somewhat strident and self-righteous. But the fact that it is signed by plaintiffs, and not lawyers, alerts the reader to the possibilities of puffery or unrealistic expectations on the part of the signatories. In addition, the sober appearance and wording of the consent form signify that important legal consequences will flow from signing it, and thus further counteract whatever emotionalism the letter may bear. And certainly, the mere fact that plaintiffs' letter adopted some heated phrases cannot, without more, make it an invalid communication. *See, e.g., Zauderer*, 471 U.S. at 641-42. For these reasons, I reject defendant's generalized objections to the consents.

In short, the March 7 letter and consent form are not flawed in any way which vitiates the consents they solicited. I see no reason to doubt that the individuals who have so far opted into this action have done so after sufficiently full and effective disclosure, such that their decisions may be considered informed. Given this finding, defendant's request for curative notice is moot.

In reaching this conclusion, I distinguish *Partlow v. Jewish Orphans' Home of Southern California*, 645 F.2d 757 (9th Cir. 1981), and *Walker v. Mountain States Telephone to Telegraph Co.*, 112 F.R.D. 44 (D. Colo. 1986). In *Partlow*, the prior consents to joining an FLSA action were invalidated because plaintiffs' counsel has solicited the consents and, in the circuit where the case arose, "named plaintiffs' counsel had no power to solicit the class members." 645 F.2d at 759. No party in this case has argued for so restrictive an approach to notice under § 216(b) as the approach enforced in *Partlow* by the invalidation of the

consents; indeed, I have already adopted in this opinion a much broader approach to § 216(b) notice in ADEA actions. In *Walker*, an ADEA case before a district court bound by the *Dolan* decision, discussed *supra*, the prior consents were invalidated because the consent forms were captioned as pleadings, the notice did not explain the right of each member to obtain separate counsel, the forms were sent out without alerting the other side in the case, and the forms incorrectly discussed consent regarding other claims than the ADEA claim. 112 F.R.D. at 48. I find the first objection by the *Walker* court to be puzzling, but in any event I do not consider the consents in the case at hand to be misleading in their physical composition; I find the second objection by the *Walker* court distinguishable for the reasons given earlier regarding the selection of counsel; and I find the third and fourth objections by the *Walker* court to be irrelevant here. Thus, I do not find these cases to be at odds with my conclusion that the prior consents in this case are valid.

4. Equitable Tolling

The last remaining issue related to count one only is the equitable tolling issue. Plaintiffs seek a ruling from me that the statute of limitations on the ADEA claim, which plaintiffs concede ran out on February 4, 1987 (unless defendant committed a willful violation of the ADEA, in which case the statute of limitations runs until Feburary 4, 1988), be tolled for all new-class members who file consents in response to the notice which I have authorized today.

It is clear that the statute of limitations governing ADEA claims may be tolled by "equitable considerations." *Callowhill v. The Allen-Sherman-Hoff Co.*, Nos. 87-1034, 87-1169 and 87-1170, slip op. at 9 (3d Cir. Nov. 4, 1987). In the case at hand,

the two-year statute of limitations for non-willful violations ran out during a period of long delay in the decision of plaintiffs' notice motions. Plaintiffs filed their action in May 1985 and filed their notice motions in August 1985. For reasons which remain unclear, the Magistrate then stayed all discovery by plaintiffs; gave defendant four months of discovery on the previously discussed issue of the validity of the prior consents; granted defendant another three months in which to prepare multiple briefs on plaintiffs' notice motions, and apparently, whatever other threshhold motions defendant desired to bring on its own behalf; waited another nine months to issue his first, insufficient, R&R; and then took another three months to, at my order, produce an R&R which gave reasons for his conclusions. All told, this process took 19 months, and ran three months past the 2-year limitations date of February 4, 1985. To this delay must be added the time since the Magistrate's supplemental R&R issued in May 1987 that I have taken to produce this decision. Of course, plaintiffs' counsel have intermittently registered their protests and pleas for speed, but delay has built up against them nevertheless.

Because this delay renders my ruling today less than "timely," *Owens v. Bethelem Mines Corp.*, 40 F.E.P. Cases 1474, 1476 (S.D.W.V. 1986), and will render moot my findings that court-facilitated notice will serve ADEA purposes unless equitable tolling is granted, and because defendant has long had timely notice of the claims in this case and plaintiffs' efforts to find more class members, plaintiffs have presented a facially compelling case for equitable tolling. *See also Owens*, 40 F.E.P. Cases at 1476-77.

I will, however, put off a final decision on the issue until after the deadline for filing consents listed in the notice authorized today has run. Defendant believes that, despite the court's delay in deciding these motions and the notice defendant has already

received, some new class members may have reasons for entering the action at this late date which would not support an exercise of equity in their favor. It is better to resolve this issue based on fact, not speculation. After all possible class members have consented in, plaintiff can present to the court each of those class members who need and want to have the limitations period tolled, and defendant can if it wishes contest the equity in tolling the limitations period for each of those people individually. The parties should be prepared to present factual allegations as to why each of the late opt-ins did not join the action before February 4, 1987. *See Owens*, 40 F.E.P. Cases at 1475 (deciding tolling issue for each applicable plaintiff individually). The notice which I authorize today shall state in part that individuals who fear that the statute of limitations may have run on their claims should not fail to join the action for that reason only, because any question regarding the applicability of the statute of limitations shall be decided by the court later in the case.

V. PENDENT JURISDICTION AND THE STATE-LAW CLAIMS

As noted earlier, defendant has separate pendent-jurisdiction objections to each of the two state-law claims asserted by plaintiffs.

1. The State Discrimination Claim

Defendant argues that this court should refuse to certify a class under Fed.R.Civ.P. 23 because the principles of pendent jurisdiction do not allow such certification. The Magistrate found this argument persuasive.

The doctrine of pendent jurisdiction allows federal courts, in certain circumstances, to exercise jurisdiction in a discretionary

manner over state-law claims which lack a federal jurisdictional basis of their own. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966); *see also Owens Equipment and Erections Co. v. Kroger*, 437 U.S. 365 (1978); *Aldinger v. Howard*, 427 U.S. 1 (1976). The Third Circuit has stated in a comprehensive fashion the test to be applied for determining whether an assertion of pendent jurisdiction is warranted. That test has three parts.

> On the first level, a court must determine whether it has constitutional power to determine a state-law claim. This "power" test depends on whether there is a "common nucleus of operative fact" between the state claim at issue and the accompanying federal claims . . . . The second level requires the court to determine whether the exercise of jurisdiction at issue would violate a particular federal policy decision . . . . At this level, the Court may consider whether the plaintiff's assertion of . . . pendent jurisdiction is an attempt to manufacture federal jurisdiction where it is otherwise foreclosed by the relevant statutes . . . . The final level — prudential in character — is for the district court, in its discretion, to weigh various factors bearing on the appropriateness of hearing a pendent claim.

Ambromovage v. United Mine Workers of America, 726 F.2d 972, 989-90 (3d Cir. 1984).

According to defendant, this court should not certify a Rule 23 class on the state LAD claim because Rule 23 will then compel the court to send notice to the class, and in that way plaintiffs will get court notice of a sort I have already denied under the

ADEA claim. Defendant argues that to grant plaintiffs court notice in this backhanded way will "manufacture federal jurisdiction" in contravention of part 2 of the *Ambromovage* test. Defendant also appears to argue that plaintiffs are requesting this court to employ Rule 23 on an opt-in basis, in contravention of that rule.

I find defendant's arguments unconvincing. I understand plaintiffs to be requesting class certification on the LAD claim under Rule 23, court notice to all class members to provide them with an opportunity to opt out, and a self-imposed limit on the definition of the LAD class to include only those people who have already joined as class members on the ADEA claim. This request differs in subtle but important ways from defendant's restatement of it. First, plaintiffs do not request that Rule 23 be revoked as an opt-in mechanism. Second, by limiting possible membership on the state LAD claim to people already members of the class under the federal ADEA claim, plaintiffs appear to avoid any possible "pendent party" difficulties. *See, e.g., Aldinger*, 427 U.S. at 14-18.

As for the notice problem raised by defendant, I note that I am skeptical that the difference in court involvement between Rule 23 notice on the pendent claim and the notice I have authorized on the ADEA claim is properly characterized as a *jurisdictional* difference, such that questions of proper pendent jurisdiction are raised. Nevertheless, I do not believe I need to reach this particular question, because for separate reasons I intend to put off any issue of Rule 23 notice until a time when, if such notice is given at all, it should have no effect whatsoever on the composition of the ADEA class, and therefore should not trouble defendant.

Plaintiffs themselves desire to include no one else in the

putative Rule 23 class on count 3 than is already included in the count-one ADEA class. Therefore, there is no analytical need for me to address the issues of class formation and notice on the LAD claim until after the membership in the ADEA class has been finalized. Given that no such need exists, I find it prudent to put off consideration of these issues until after membership in the ADEA class is set, for the following reasons. First, an informed decision on LAD class formation issues can best be reached after the identities of all possible class members are known. Such will be the case after membership in the ADEA class is finalized. Second, confusion among potential class members regarding the differences between opt-in and opt-out choices, and between notice from plaintiffs and notice from the court, can best be avoided by separating in time the ADEA notice and any Rule 23 notice which may eventually be required. I thus contemplate a schedule in which putative class members receive notice of the ADEA claim only, all timely consents are received by the court, the issue of "similar situations" is decided, and only then is the issue of Rule 23 certification on the LAD claim decided and, if certification is granted, the issue of court notice to all Rule 23 class members is considered.

If defendant has any valid argument that Rule 23 notice on a pendent claim is unfair or impermissible when a companion ADEA claim is the subject of a different type of notice, that argument would be based on a concern that the Rule 23 notice might generate more, or different, plaintiffs than the ADEA notice alone. I believe that the timing which I contemplate here will necessarily avoid any such differences between the ADEA class and any Rule 23 class which might eventually be certified. Thus, I believe that the timing contemplated will assure the validity of each separate act of notice, and of the court's retention of the state-law claim. For these reasons, defendant's motion to deny

class certification of the LAD claim on pendent jurisdictional grounds is denied.

2. The State Contract Claim

Defendant argues that this court should refuse to exercise pendent jurisdiction over count four because the court lacks power to assert that jurisdiction, or alternatively because discretion warrants such refusal. The Magistrate found this argument persuasive.

Count four states a claim for the violation of an implied contract of employment, made out in defendant's employment manual, establishing that defendant would fire employees for good cause only. In *Woolley v. Hoffmann-La Roche, Inc.*, 99 N.J. 284, *modified*, 101 N.J. 10 (1985), a case involving the same defendant as in the case at hand, and, according to plaintiffs, the same employment manual, the Supreme Court of New Jersey established the validity in New Jersey law of such claims under a theory of implied employment contracts. Plaintiffs now seek to apply *Woolley* to the employment decisions in this case allegedly based on age discrimination.

Defendant claims first that this court lacks the power to retain count four because it and the federal ADEA claim share no "common nucleus of operative fact." *Gibbs*, 383 U.S. at 725; *see Ambromovage*, 726 F.2d at 990. The parties agree that this question is to be decided by reference to the pleadings only. *Lentino v. Fringe Employee Plans, Inc.*, 611 F.2d 474, 478-79 (3d Cir. 1979).

In this case, plaintiffs' federal ADEA claim turns on the facts of the February 4, 1985 RIF: how the termination and demotion

decisions which comprised the February 4, 1985 RIF were made and whether they were affected by discriminatory intent or effect. The state contract claim turns on the same facts precisely, plus whatever additional facts are necessary to establish the exact contents of the employee manual/contract which applied to each plaintiff. See plaintiffs' amended complaint at paragraphs 24-30. I have no difficulty concluding that the ADEA claim and the state contract claim share a nucleus of operative fact sufficiently common to establish this court's jurisdictional power over the contract claim. *See, e.g., Studint v. La Salle Ice Cream Co.*, 623 F. Supp. 232, 234 (E.D.N.Y. 1985) (federal ADEA claim plus, *inter alia*, a state-law claim based on an employment contract); *Placos v. Cosmair, Inc.*, 517 F. Supp. 1287, 1289 (S.D.N.Y. 1981) (federal ADEA claims plus, *inter alia*, state-law claim based on employment contracts); *Rechsteiner v. Madison Fund, Inc.*, 75 F.R.D. 499, 506 (D. Del. 1977) (federal ADEA claim plus, *inter alia*, state-law claim based on alleged oral employment contract). I find the cases cited by defendant in support of their argument that no power exists to be either readily distinguishable on their facts, *see, e.g., PAAC v. Rizzo*, 502 F.2d 307 (3d Cir. 1974, *cert. denied*, 419 U.S. 1108 (1985); *Hales v. Winn-Dixie Stores, Inc.*, 500 F.2d 836 (4th Cir. 1974), or unduly restrictive in their application of the "common nucleus" test, *see, e.g., Mason v. Richmond Motor Co.*, 625 F. Supp. 883 (E.D. Va. 1986); *Watkins v. Milliken & Co.*, 613 F. Supp. 408 (D.N.C. 1984).

Defendant claims second that even if this court retains jurisdictional power over count four, it should decline to exercise that power for discretionary reasons. According to *Gibbs*, the discretion to decline an exercise of pendent jurisdiction involves "considerations of judicial economy, convenience, and fairness to litigants," weighted by such concerns as the avoidance of "[n]eedless decisions of state law," the avoidance of federal

adjudications in cases where "state issues substantially predominate," and the avoidance of "the likelihood of jury confusion in treating divergent legal theories of relief." 383 U.S. at 726-27. *See Ambromovage*, 726 F.2d at 990-91 and note 53.

In the case at hand, it is quite clear to me that considerations of economy, convenience, and fairness all militate strongly in favor of keeping count four in this case. Plaintiffs seek to prove in part that the way in which they were fired or demoted was infected with age discrimination, in violation of federal statutes and private employment contracts. Defendant must put forth persuasive reasons indeed why I should exercise my discretion so as to bifurcate plaintiffs' contractual age discrimination claim from plaintiffs' federal statutory age discrimination claim, and force plaintiffs to present their basic age discrimination allegations twice, in two separate actions.

Defendant has failed to produce such reasons. I see no great danger that the retention of count four will damage federal-state comity through "needless" state-law decisions, *see Gibbs*, 383 U.S. at 726. *Woolley* itself established the innovative principle that employee manuals can constitute enforceable employment contracts; what remains for courts in cases such as the one at hand is the task of applying settled state contract law to this new type of contract. Contrast *Grubb v. W.A. Foote Memorial Hospital, Inc.*, 741 F.2d 1486, 1500 (6th Cir. 1984) (finding "new state-law principles" or "novel" applications of old principles to be at stake); *Watkins*, 613 F. Supp. at 422 (neither state legislature nor state courts had yet recognized "implied contract" exception to at-will employment).

Nor do I see much of a threat of jury confusion. *Woolley* itself notes that issues concerning contract existence and

interpretation may be for the court only. 99 N.J. at 307 and note 13. And should issues on the contract claim require jury attention, any confusion which threatens to arise can be dealt with through jury instructions, the use of verdict interrogatories, or division of the trial into separate segments. *See, e.g., Benedetto v. Pepsi Cola Bottling Group,* Civil No. 86-2557, slip op. at 7 (D.N.J. January 5, 1987); *Placos,* 517 F. Supp. at 1289.

Nor do I discern any hint that state law will predominate in this action. The gravamen of plaintiffs' claims is age discrimination in the Operation Turnabout RIF. This is, of course, the heart of plaintiffs' federal claim. Plaintiffs claim a broad array of damages and equitable relief under the ADEA; the only remedies they seek which are peculiar to count four are punitive damages for shame and emotional distress. *See Rogers v. Exxon Research & Engineering Co.,* 550 F.2d 834 (3d Cir. 1977), *cert. denied,* 434 U.S. 1022 (1978). Whatever state-law contract issues do ultimately arise, I simply cannot foresee them predominating at either the liability or damages phases of this case.

For all these reasons, I refuse to employ my discretion to decline jurisdiction over count four. *See* generally *Lusardi,* 99 F.R.D. at 93-94; *Sussman,* 90 F.R.D. at 690.

VI. CLASS CERTIFICATION AND THE STATE-LAW CLAIMS

I have earlier discussed how any Rule 23 class certification decision on count three is to be put off until after the composition of the count one class is finalized. For the same reasons, any Rule 23 class certification decision on count four should be put off to the same time.

VII. DISCOVERY

Discovery for plaintiffs has been stayed almost since the outset of this action, and has remained so for more than two years. As pointed out previously, defendant has had three months of discovery on the issue of the validity of the prior consents, and no other discovery. Why a stay of any length, for either side, was ever appropriate is wholly unclear to me. Plaintiffs now apply to me for an order that discovery may go forward. If this application brings the stay before me on appeal from the Magistrate, I vacate it as clearly erroneous and contrary to law. If the application is a new motion, made to me in the first instance, to allow discovery now that the pending motions are resolved, it is granted.

The parties may immediately begin any discovery now permitted by the federal and local rules. The parties deserve, if nothing else, a chance to test the strength of plaintiffs' claims and defendant's defenses through the mechanisms of discovery. The parties shall be ordered to report to my current Magistrate, the Hon. Stanley R. Chesler, at his earliest convenience, so that scheduling orders may be drawn and he may impose whatever pre-trial regulations he may see fit to impose, including expedited discovery, which are not in conflict with my findings today and which in his discretion follow the spirit of the projected pretrial schedule I have included as Appendix B of this opinion. In particular, the Magistrate may wish to consider expediting whatever discovery plaintiffs may need to conduct before resubmitting to me their request for the posting and publication of notice on defendant's premises. In no event shall my discovery findings in this part of the opinion supercede my earlier command that defendant proceed forthwith to comply with plaintiffs' request for discovery of the names and addresses of putative count-one class members.

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VII. CONCLUSION

In conclusion, I have considered all of Magistrate Haneke's recommendations and his discovery stay. I have for the most part rejected or modified his recommendations, and have ordered discovery to resume immediately. Specifically, I deny defendant's motion for dismissal of or summary judgment on plaintiffs' disparate impact claims. I grant plaintiffs' request for discovery against defendant of the names and addresses of putative count-one class members; I grant plaintiffs' request for mailing notice to newly discovered class members, so long as the notice comes from plaintiffs or plaintiffs' counsel and bears the court's authorization; and I deny plaintiffs' request for posting and publishing notice on defendant's premises because that request is too vague. I put off any final decision on whether plaintiffs and those they wish to represent are similarly situated. I deny defendant's motion to invalidate the prior consents to join and send out corrective notice. I deny defendant's motions to refuse jurisdiction over counts three and four. I put off consideration of Rule 23 class certification on counts three and four. General discovery shall resume immediately, the parties shall see Magistrate Chesler at his earliest convenience for general pre-trial instructions, and defendant shall produce the requested names and addresses forthwith. I attach two appendices to this opinion. Appendix A contains the notice for mailing and Appendix B contains a projected pre-trial schedule embodying the effect of my decision today.

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APPENDIX A [TO OPINION]

Notice for Mailing

NOTICE

(Date)

FROM: (Plaintiffs or Plaintiffs' Counsel)

TO: Present and former employees of Hoffmann-LaRoche, Inc. ("Roche" or "HLR"), between the ages of 40 to 70 who have been involuntarily terminated, laid off or demoted from employment pursuant to the staff reduction program of Roche implemented on or about February 4, 1985.

RE: Age Discrimination Law Suit filed against Roche

(1) INTRODUCTION. The purpose of this Notice is to inform you of the existence of a class action law suit in which you may be a member of the Plaintiff class, to advise you of how your rights may be affected by this suit, and to instruct you on the procedure for participating in this suit if you so desire.

(2) DESCRIPTION OF THE LAW SUIT. On May 1, 1985, Richard Sperling, Frederick Hemsley, and Joseph Zelauskas brought this suit against Roche in the federal District Court for the District of New Jersey, alleging that they were discriminated against and involuntarily terminated from employment because of their age, in violation of the federal Age Discrimination and Employment Act ("ADEA") and the New Jersey Law Against Discrimination ("NJLAD"). In particular, the plaintiffs have contended that a Roche staff reduction program instituted in

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February, 1985 discriminated, in the selection for termination and demotion, against certain employees over the age of 40. Plaintiffs seek back pay, forward pay, lost pension and other fringe benefits, money damages and, where appropriate reinstatment to their former positions. Plaintiffs have also asserted claims for breach of employment contracts under New Jersey law. The law suit, which Roche is opposing, is proceeding through pre-trial stages.

(3) COMPOSITION OF THE AGE DISCRIMINATION CLASS. The three named plaintiffs seek to sue on behalf of themselves and also on behalf of other employees with whom they are similarly situated. Specifically, the plaintiffs seek to sue on behalf of any and all employees who were, at any time from on or about January 1, 1985 to date:

(a) over 40 but less than 70 years of age;

(b) employed by HLR at any of its locations nationwide in a non-union position or a position not subject to a collective bargaining agreement;

(c) (1) if an exempt employee (i) with an HLR salary grade level of 10 or above, or (ii) if below an HLR salary grade level of 10, with a base annual salary at or greater than the midpoint of such salary grade level, or (2) if a non-exempt employee, with a base annual salary of at least $20,000;

(d) involuntarily discharged, laid off, terminated, downgraded or demoted from employment by HLR:

(e) subjected to such adverse employment actions as described in (d) pursuant to or in connection with a staff

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reduction action and/or layoff implemented by HLR on or about February 4, 1985.

(4) YOUR RIGHT TO PARTICIPATE IN THIS SUIT. If you fit the definition above, you may join this suit (that is, you may "opt in") provided that you cause to be filed a "Consent to Join" in the very near future. Consent to Join forms and information regarding the specific filing deadline are available from the sources listed at the end of this notice.

Your eligibility to file a Consent to Join is not affected by your previous filing or failure to file any charge or complaint of age discrimination with any federal, state or local agency.

Your eligibility to file a Consent to Join is not affected by any statute of limitations. Even if you file a Consent to Join, however, your continued right to participate in this suit may depend upon a later decision by the District Court that no statute of limitations has run against you. In addition, your continued right to participate may depend upon a later decision that you and the plaintiffs are similarly situated, in accordance with federal law.

(5) EFFECT OF JOINING THIS SUIT. If you choose to join this suit, you will be bound by the judgment whether it is favorable or unfavorable. While the suit is proceeding you may be required to provide information, sit for depositions, and testify in court. You will not be required to pay attorneys' fees directly. The plaintiffs' attorneys will receive a part of any money judgment entered in favor of the class.

(6) NO LEGAL EFFECT IN NOT JOINING THIS SUIT. If you choose not to join this suit, you will not be affected by the judgment, favorable or unfavorable. If you choose not to

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join this suit, you are free to file your own law suit.

(7) YOUR LEGAL REPRESENTATION IF YOU JOIN. If you choose to join this suit, your interest will be represented by the named plaintiffs through their attorneys, as counsel for the class. The counsel for the class are:

Leonard N. Flamm, Esq.
Hockert & Flamm
880 Third Avenue
New York, New York 10022
(212) 752-3380

Ben H. Becker, Esq.
Schwartz, Tobia & Stanziale
22 Crestmont Road
Montclair, New Jersey 07042
(201) 746-6000

(8) FURTHER INFORMATION. Further information about this suit, the deadline for filing a Consent to Join, and the availability of Consent to Join forms can be obtained by
(Plaintiffs provide instructions)

Signed,
(Plaintiffs or Plaintiffs' Counsel)

THIS NOTICE AND ITS CONTENTS HAS BEEN AUTHORIZED BY THE FEDERAL DISTRICT COURT, HON. HAROLD A. ACKERMAN, JUDGE. THE COURT HAS TAKEN NO POSITION REGARDING THE MERITS OF THE PLAINTIFFS' CLAIMS OR OF ROCHE'S DEFENSES.

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 85-2138

CONSENT TO JOIN ACTION
{Pursuant to 29 USC § 216(b)]

RICHARD SPERLING, FREDERICK HEMSLEY and JOSEPH ZELAUSKAS, individually and on behalf of others similarly situated,

Plaintiffs,

v.

HOFFMAN-LA ROCHE, INC.,

Defendant.

TO: THE CLERK OF THE COURT AND TO EACH PARTY AND COUNSEL OF RECORD:

STATE OF :
ss:
COUNTY OF :

_____, being duly
(name)
sworn, deposes and says:

1. I reside at _____.
I was born on _____, and was over the age of forty (40) years on _____, the date on which

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(Check either a or b):

_____ a. My employment with Hoffman-LaRoche ("Roche") was involuntarily terminated or I was laid off.

_____ b. I was demoted to a lesser position at Roche.

(Check either 2 or 3):

_____ 2. As an exempt employee, my base salary level at the time of my termination was Grade _____. If Grade 10 or under, my actual salary _____ (was, was not) at or greater than the midpoint of the Grade.

_____ 3. As a non-exempt employee, my base pay at termination was at least $20,000 per annum.

4. I understand this suit is being brought under the federal Age Discrimination in Employment Act. I have read and I understand the notice accompanying this Consent. As a former employee of Roche, I hereby consent, agree and opt-in to become a party plaintiff herein and to be bound by any settlement of this action or adjudication of the Court.

5. I hereby authorize the named plaintiffs, or plaintiffs' counsel of record, to file this Consent with the Clerk of the Court.

6. I hereby further authorize the named plaintiffs herein to retain their counsel of record or select new counsel, as they shall determine in their discretion, and I hereby further authorize such counsel to make such further decisions with respect to the conduct and handling of this action, including the settlement thereof, as they deem appropriate or necessary.

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_____

(full signature)

_____

(type or print name)

Sworn and subscribed to before me
this ____ day of _____, 1987.

_____

RETURN FOR FILING BEFORE (deadline date in notice)

TO: (Plaintiffs provide instructions.)

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APPENDIX B [TO OPINION]

Projected Pre-Trial Schedule

Immediately:

(1) Plaintiffs given discovery of names and addresses.

(2) Resumption of normal discovery by both sides on all issues generally.

Upon completion of discovery of names and addresses:

Plaintiffs mail authorized notice, including consent form. Deadline for all remaining consents is 45 days from mailing. Plaintiffs shall certify to court and defendant the date of mailing.

After deadline for all consents:

Expedited discovery on "similarly situated" issue, equitable tolling issue. Magistrate Chesler shall, in setting expedited schedule, take note of whatever discovery defendant has already had relevant to the "similarly situated" issue.

After expedited discovery above:

Motions to court on "similarly situated" issue, equitable tolling issue, class certification of state law claims.

If class certification on state-law claims is granted:

Mailing of opt-out notice to state-law claim class members.

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ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED JANUARY 5, 1988

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 85-2138

RICHARD SPERLING, et al., individually and on behalf of others similarly situated,

Plaintiffs,

vs.

HOFFMANN-LA ROCHE, INC.,

Defendant.

ORDER

For the reasons stated in this court's opinion filed in this action this same date,

IT IS on this 5th day of January, 1988

ORDERED that

1. Defendant's for dismissal of or summary judgment on plaintiffs' disparate impact claims is denied;

2. Plaintiffs' request for discovery from defendant of the names and addresses of absent count-one class members is granted, and defendant shall provide this discovery forthwith;

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3. Plaintiffs' request for court notice to absent count-one class members is granted in part and denied in part, and plaintiffs are authorized to mail out the notice and consent-to-join form attached to this order as Appendix A to newly discovered count-one class members;

4. Plaintiffs' request for posting and publication of notice on defendant's premises is denied without prejudice as vague;

5. Defendant's motion to invalidate the prior consents to join is denied and defendant's request for corrective notice is denied as moot;

6. Defendant's motion for this court to decline pendent jurisdiction over count three is denied;

7. Defendant's motion for this court to decline pendent jurisdiction over count four is denied;

8. The court's decisions on plaintiffs' motions for class certification under Fed. R. Civ. P. 23 in regard to counts three and four, and on plaintiffs' motion for equitable tolling of the statute of limitations in regard to count one, and the court's full decision that class members under count one are similarly situated in accordance with 29 U.S.C. § 216(b), are all withheld pending the full assembly of the count-one class as discussed in the court's opinion filed this same date, and the schedule for rendering those decisions is contemplated to follow the projected pretrial schedule included as Appendix B of the opinion filed this same date; and

9. All stays of discovery in this action are lifted and the parties shall resume normal discovery in accordance with the federal and local rules; the parties shall report to Magistrate Stanley R. Chesler

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at his earliest convenience to receive his pretrial instructions, which shall not conflict with the findings I have made in the opinion filed this same date and which in his discretion shall follow the spirit of Appendix B to that opinion; provided that nothing in this paragraph number 9 shall override the discovery obligation imposed in paragraph number 2.

s/ Harold A. Ackerman
HAROLD A. ACKERMAN,
U.S.D.J.

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APPENDIX A [TO ORDER]

Notice for Mailing

NOTICE

(Date)

FROM: (Plaintiffs or Plaintiffs' Counsel)

TO: Present and former employees of Hoffmann-LaRoche, Inc. ("Roche" or "HLR"), between the ages of 40 to 70 who have been involuntarily terminated, laid off or demoted from employment pursuant to the staff reduction program of Roche implemented on or about February 4, 1985.

RE: Age Discrimination Law Suit filed against Roche

(1) INTRODUCTION. The purpose of this Notice is to inform you of the existence of a class action law suit in which you may be a member of the Plaintiff class, to advise you of how your rights may be affected by this suit, and to instruct you on the procedure for participating in this suit if you so desire.

(2) DESCRIPTION OF THE LAW SUIT. On May 1, 1985, Richard Sperling, Frederick Hemsley, and Joseph Zelauskas brought this suit against Roche in the federal District Court for the District of New Jersey, alleging that they were discriminated against and involuntarily terminated from employment because of their age, in violation of the federal Age Discrimination and Employment Act ("ADEA") and the New Jersey Law Against Discrimination ("NJLAD"). In particular, the plaintiffs have contended that a Roche staff reduction program instituted in

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February, 1985 discriminated, in the selection for termination and demotion, against certain employees over the age of 40. Plaintiffs seek back pay, forward pay, lost pension and other fringe benefits, money damages and, where appropriate, reinstatment to their former positions. Plaintiffs have also asserted claims for breach of employment contracts under New Jersey law. The law suit, which Roche is opposing, is proceeding through pre-trial stages.

(3) COMPOSITION OF THE AGE DISCRIMINATION CLASS. The three named plaintiffs seek to sue on behalf of themselves and also on behalf of other employees with whom they are similarly situated. Specifically, the plaintiffs seek to sue on behalf of any and all employees who were, at any time from on or about January 1, 1985 to date:

(a) over 40 but less than 70 years of age;

(b) employed by HLR at any of the locations nationwide in a non-union position or a position not subject to a collective bargaining agreement;

(c) (1) if an exempt employee (i) with an HLR salary grade level of 10 or above, or (ii) if below an HLR salary grade level of 10, with a base annual salary at or greater than the midpoint of such salary grade level, or (2) if a non-exempt employee, with a base annual salary of at least $20,000;

(d) involuntaily discharged, laid off, terminated, downgraded or demoted from employment by HLR;

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reduction action and/or layoff implemented by HLR on or about February 4, 1985.

(4) YOUR RIGHT TO PARTICIPATE IN THIS SUIT. If you fit the definition above, you may join this suit (that is, you may "opt in") provided that you cause to be filed a "Consent to Join" in the very near future. Consent to Join forms and information regarding the specific filing deadline are available from the sources listed at the end of this notice.

Your eligibility to file a Consent to Join is not affected by your previous filing or failure to file any charge or complaint of age discrimination with any federal, state or local agency.

Your eligibility to file a Consent to Join is not affected by any statute of limitations. Even if you file a Consent to Join, however, your continued right to participate in this suit may depend upon a later decision by the District Court that no statute of limitations has run against you. In addition, your continued right to participate may depend upon a later decision that you and the plaintiffs are similarly situated, in accordance with federal law.

(5) EFFECT OF JOINING THIS SUIT. If you choose to join this suit, you will be bound by the judgment whether it is favorable or unfavorable. While the suit is proceeding you may be required to provide information, sit for depositions, and testify in court. You will not be required to pay attorneys' fees directly. The plaintiffs' attorneys will receive a part of any money judgment entered in favor of the class.

(6) NO LEGAL EFFECT IN NOT JOINING THIS SUIT. If you choose not to join this suit, you will not be affected by

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the judgment, favorable or unfavorable. If you choose not to join this suit, you are free to file your own law suit.

(7) YOUR LEGAL REPRESENTATION IF YOU JOIN. If you choose to join this suit, your interest will be represented by the named plaintiffs through their attorneys, as counsel for the class. The counsel for the class are:

Leonard N. Flamm, Esq.
Hockert & Flamm
880 Third Avenue
New York, New York 10022
(212) 752-3380

Ben H. Becker, Esq.
Schwartz, Tobia & Stanziale
22 Crestmont Road
Montclair, New Jersey 07042
(201) 746-6000

(8) FURTHER INFORMATION. Further information about this suit, the deadline for filing a Consent to Join, and the availability of Consent to Join forms can be obtained by
(Plaintiffs provide instructions)

Signed,
(Plaintiffs or Plaintiffs' Counsel)

THIS NOTICE AND ITS CONTENTS HAS BEEN AUTHORIZED BY THE FEDERAL DISTRICT COURT, HON. HAROLD A. ACKERMAN, JUDGE. THE COURT HAS TAKEN NO POSITION REGARDING THE MERITS OF THE PLAINTIFFS' CLAIMS OR OF ROCHE'S DEFENSES.

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 85-2138

CONSENT TO JOIN ACTION
[Pursuant to 29 USC § 216(b)]

RICHARD SPERLING, FREDERICK HEMSLEY and JOSEPH ZELAUSKAS, individually and on behalf of all other persons similarly situated,

Plaintiffs,

v.

HOFFMAN-LA ROCHE, INC.,

Defendant.

TO: THE CLERK OF THE COURT AND TO EACH PARTY AND COUNSEL OF RECORD:

STATE OF :
ss:
COUNTY OF :

_____ being duly
(name)
sworn, deposes and says:

1. I reside at _____. I was born on _____, and was over the age of forty (40) years on _____, the

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date on which

(Check either a or b):

_____ a. My employment with Hoffman-LaRoche ("Roche") was involuntarily terminated or I was laid off.

_____ b. I was demoted to a lesser position at Roche.

(Check either 2 or 3):

_____ 2. As an exempt employee, my base salary level at the time of my termination was Grade _____. If Grade 10 or under, my actual salary _____ (was, was not) at or greater than the midpoint of the Grade.

_____ 3. As a non-exempt employee, my base pay at termination was at least $20,000 per annum.

4. I understand this suit is being brought under the federal Age Discrimination in Employment Act. I have read and I understand the notice accompanying this Consent. As a former employee of Roche, I hereby consent, agree and opt-in to become a party plaintiff herein and to be bound by any settlement of this action or adjudication of the Court.

5. I hereby authorize the named plaintiffs, or plaintiffs' counsel of record, to file this Consent with the Clerk of the Court.

6. I hereby further authorize the named plaintiffs herein to retain their counsel of record or select new counsel, as they shall determine in their discretion, and I hereby further authorize such counsel to make such further decisions with respect to the conduct

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and handling of this action, including the settlement thereof, as they deem appropriate or necessary.

_____

(full signature)

_____

(type or print name)

Sworn and subscribed to before me
this ____ dav of _____, 1987.

_____

RETURN FOR FILING BEFORE (deadline date in notice)

TO: (Plaintiffs provide instructions.)

OPPOSITION

BRIEF

(2) 88-1203

In The

Supreme Court of the United States

October Term, 1988

HOFFMANN-LA ROCHE INC.,

Petitioner,

vs.

RICHARD SPERLING, FREDERICK HEMSLEY AND JOSEPH ZELAUSKAS, Individually, and on behalf of all other persons similarly situated,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF RESPONDENTS

BEN H. BECKER
SCHWARTZ, TOBIA & STANZIALE
22 Crestmont Road
Montclair, New Jersey 07040
(201) 746-6000

LEONARD N. FLAMM
HOCKERT & FLAMM
880 Third Avenue
New York, New York 10022
(212) 752-3380

Attorneys for Respondents

Dated: February 21, 1989

18 pp

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INTRODUCTION

Respondents herein submit their Brief in Opposition to the Petition for a Writ of Certioriari herein sought.

ARGUMENT

I.

THERE ARE NO EXTRAORDINARY CIRCUMSTANCES PRESENTED WHICH SHOULD CAUSE THE COURT TO DEPART FROM ITS NORMAL PRACTICE OF DENYING INTERLOCUTORY REVIEW.

The order of the Third Circuit, sought to be reviewed herein, affirmed that portion of the District Court's decision that it had the power to authorize a notice of pendency to be sent to certain persons who had not yet joined this action. The matter was remanded for further proceedings consistent with its decision (App. A at 20a-21a). The order and decision below are thus clearly interlocutory in nature.

Except in extraordinary situations, the Court should decline to hear on certiorari appeals from interlocutory orders. *Estelle v. Gamble*, 429 U.S. 97, 115 (Stevens, J. dissenting). Lack of finality below is a sufficient reason to deny the petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

The instant case arises from a reduction in force implemented by Petitioner on or about February 4, 1985. The Petitioner is currently defending itself in this suit against claims asserted under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA") of over 400 persons terminated as part of the reduction in force. The decision below only provides for a notice of the pending action to be sent to those persons who fit the class

definition (App. C. at 61a) and who have not joined the action (App. C. at 70a). While the notice may be sent to as many as 298 additional persons, it is speculative whether, four years after the reduction in force, a large number of additional persons will seek to join the lawsuit. (*See* Point II, *infra*.) It is thus unlikely that the scope of this litigation or the burden on the Petitioner will be substantially affected by the decision below. In any event, any further inconvenience to the Petitioner resulting from the decision is sufficiently minimal so as not to constitute justification for departure from the Court's normal review practices.

II.

THE COURT SHOULD DECLINE TO HEAR THIS ISSUE BECAUSE THE PARTIES MOST DIRECTLY AFFECTED BY ITS DETERMINATION ARE NOT PRESENTLY BEFORE THE COURT.

As indicated in the Petitioner's Statement of the Case (Petition at 5), over 400 consents to join this action have already been filed in this case. A list of those parties is contained in the Petition; however, a determination of the issue presented to this Court does not bear upon *their* rights at all. To the extent that the Named Plaintiffs have considered it to be in their interest to obtain other participants to join in their collective action, that need has heretofore been fairly satisfied by the joinder of a large number of opt-in plaintiffs.

The real parties in interest remain only those absent class members who have not received any notice through the previous informal solicitation process and who might or might not elect to participate in the action after receiving notice thereof. Inasmuch as the statute of limitations has expired with respect to both willful and non-willful violations of the ADEA, that group may be further pared to the extent the District Court declines to allow equitable

tolling as to all or some of the consent forms to be filed in response to the court-authorized notice of pendency. The Court should thus be most hesitant in adjudicating the rights of an indeterminate number of non-identified potential litigants, some or all of whom may never become litigants.

III.

THE ASSERTED CONFLICT IN CIRCUIT COURT DECISIONS RELATIVE TO A DISTRICT COURT'S POWER UNDER 29 U.S.C. § 216(b) TO AUTHORIZE AND FACILITATE THE DISTRIBUTION OF A CLASS NOTICE HAS BEEN SUBSTANTIALLY ELIMINATED IN RECENT YEARS AS A RESULT OF EVOLVING FEDERAL DECISIONAL LAW.

The question of whether federal district courts have the requisite power to authorize and/or facilitate the distribution of a notice of pendency to absent class members, inviting them to join a suit under 29 U.S.C. § 216(b), can no longer be considered an issue as to which there remains any substantial conflict. Rather, it has come to be an issue which has fairly resolved itself over the past few years through the sheer number and quality of recent federal circuit and district decisions which have carefully considered the question. Whether it ever was a "long standing controversy", as Petitioner contends (Petition at 8), the issue is surely not a significant issue today which still divides the federal courts. In fact, in recent years, the great weight of circuit and district court decisions have rather conclusively settled the issue by finding that a district court does indeed have such authority to be exercised in an appropriate case. This evolutionary process has resulted from two significant recent case law developments:

(1) A clarified and comprehensive analysis by the Federal Circuit in *United States v. Cook*, 795 F.2d 987 (1986) as to the

impact of the legislative history surrounding the 1947 congressional amendments to § 16(b) of the Fair Labor Standards Act ("FLSA"). ("Section 216(b)");

(2) The clearing away of any lingering barratry-based objections to the solicitation of opt-in consent forms as a result of this Court's own recent decisions in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 105 S. Ct. 2265, 851 F.2d 652 (1985) and *Shapero v. Kentucky Bar Association*, 486 U.S. ____, 108 S. Ct. 1916 (1988).

As a result of these two principal developments, the dual structural underpinning for the circuit court decisions in the Eighth, Ninth, and Tenth Circuits, discussed *infra*, have been fairly eroded. Today it is these three (3) circuit court decisions which not only represent a decided minority viewpoint, but also reflect an effectively discredited one. There is reason to believe that these circuits will respectively revise their previous positions, in light of *Zauderer and Shapero*, as well as the more probing analysis of the legislative history of Section 216(b) contained in *Cook*, when the issue is again presented to them.

A brief historical review of this evolutionary process will demonstrate that no worthwhile purpose would any longer be served for this Court to intervene to resolve an already resolving conflict in the circuits.

In 1977, without the benefit of any in-depth inquiry into the applicable legislative history, the first of the three minority circuits, the Ninth Circuit, in *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859, 862 (9th Cir. 1977), rejected the authority of a district court either to authorize or facilitate the distribution of any class-wide notice under the FLSA. That decision was fundamentally grounded in the notion (now defunct, as discussed *infra*) that it would be improper barratry for an attorney, directly or through his clients,

to notify potential class members of a pending suit brought under the FLSA and of their opportunity to participate in the suit by signing an opt-in consent form.

One year later, in *Braunstein v. Eastern Photographic Laboratories, Inc.*, 600 F.2d 335 (2d Cir. 1978), *cert. denied*, 441 U.S. 944 (1979), the Second Circuit specifically rejected and declined to follow the *Kinney* rationale, noting that the absence of any explicit provision in Section 216(b) *authorizing* notice to potential class members could not meaningfully be read as constituting a basis for *prohibiting* such notice to potential class members. The Second Circuit noted that the broad remedial purpose behind the FLSA and the avoidance of a multiplicity of individual suits that would otherwise result provided cogent reasons for favoring the judicial authorization for circulation of a notice of pendency. *Id.* at 336.

It is noteworthy that this Court denied certiorari in *Braunstein*, 441 U.S. 944 (1979). Ordinarily, the refusal by this Court to grant certiorari creates no inference regarding the correctness of the lower court's decision. Nevertheless, the issue presented to the Court at that time in 1979 was the identical issue which is before this Court again today, less than 10 years later. From that denial of certiorari in 1979, in the face of a "conflict" in circuits between the Second and Ninth Circuits, it may reasonably be inferred that this Court's view in 1979 was that the Second Circuit in *Braunstein* had adopted the better view of the issue and had correctly rejected the Ninth Circuit's previous analysis in *Kinney*. Hence, that denial of certiorari may fairly imply that this Court was then satisfied that the apparent conflict between the Second and Ninth Circuits either was not of sufficient gravity or that it had been effectively resolved. Although there have been five (5) more circuits which have addressed the issue since 1979, the weight of authority supporting the *Braunstein* approach has become even more impressive. Accordingly, there

is even less need today than in 1979 for review by this Court.

In 1982, the Seventh Circuit in *Woods v. New York Life Insurance Co.*, 686 F.2d 578 (7th Cir. 1982) specifically rejected the Ninth Circuit's rationale and reaffirmed the Second Circuit's approach in *Braunstein*. Although the Seventh Circuit in *Woods* expressed some disfavor in having the notice of pendency sent out on actual "court letterhead", the Seventh Circuit fundamentally confirmed the authority and power of a district court to send out such a notice to all potential litigants advising them of rights to opt-in to a pending suit. *Id.* at 580.

In 1984, two more circuits declined to follow the *Kinney* rationale of the Ninth Circuit relative to the question of barring all extra-judicial attempts by private counsel or their clients to solicit joinder of absent class members.[1] The *Kinney* rationale was, however, not yet totally rejected by these two Circuits. In *Dolan v. Project Construction Corp.*, 725 F.2d 1263 (10th Cir. 1984) the Tenth Circuit, although allowing extra-judicial communications, declined to allow the district courts to become involved in facilitation of the solicitation process. *Id.* at 1267-68. Notably, the grounds asserted by the Tenth Circuit for disallowing court facilitation of any notice was not because of any barratry-based considerations, but because of a belief that the legislative history leading to the enactment of the 1947 amendments to Section 216(b) reflected a congressional reluctance to authorize the district court's facilitation of the distribution of a notice of pendency. Unfortunately, the Tenth Circuit did not delve deeply enough into

1. The strictness of *Kinney* was substantially modified in *Partlow v. Jewish Orphans Home of Southern California*, 645 F.2d 757 (9th Cir. 1981), which allowed a court-supervised resolicitation of certain previously voided opt-in consent forms.

the applicable legislative history.[2]

In reaching its decision in *Dolan*, the Tenth Circuit placed substantial reliance on the notion that Congress had sought to limit the scope of FLSA class actions which could be brought under Section 216(b). In its analysis of the legislative history, the *Dolan* court however failed to realize that the particular type of class action which, in 1947, Congress had sought to limit, related only to a "representative" action brought by an individual or organization which was not an actual grievant. The statutory amendments of 1947 were only designed to curb this type of action; they were not intended to have any bearing at all on any "collective" action, such as that at bar, where the named and representative plaintiffs in the class action are themselves also actual grievants (App. A at 15a-16a).

The plain error in the Tenth Circuit's analysis of the legislative history was dispositively pointed out by the Federal Circuit in *United States v. Cook*, 795 F.2d 987 at 990-93 (Fed. Cir. 1986). The Federal Circuit's careful research into the legislative history revealed that no solicitation limitation was ever intended by Congress to apply to a collective, as opposed to a representative action (App. A at 18a). The Third Circuit in this case then confirmed the correctness of the Federal Circuit's analysis of the legislative history (App. at 15a). It is thus clear today that the legislative history argument against solicitation reflected in *Dolan* has been fairly rejected.

In 1984, the third of the minority circuits, the Eighth Circuit in *McKenna v. Champion International Corp.*, 747 F.2d 1211 (8th Cir. 1984), declined to approve a district court's action in

2. *Dolan* departed from *Kinney* in holding that the named plaintiffs could freely communicate among themselves and with other potential members of their class to prosecute a collective action.

authorizing and facilitating the circulation of a notice of pendency. In so doing, the Eight Circuit in *McKenna* relied on a reason wholly different from, but surely no more valid than, that reflected in *Dolan*. The Eighth Circuit grounded its decision disallowing judicial solicitation on the same barratry-based considerations as had previously been espoused by the Ninth Circuit in *Kinney*. *Id.* at 1215-16. From 1984 to 1988, there was some doubt that the *McKenna* rationale had any continuing validity. In 1988, the doubt was finally laid to rest.

After the Federal Circuit's decision in *Cook* clarifying the legislative history, this Court, in 1988, in *Shapero*, cited *supra*, effectively rejected the continuing validity of any barratry-based objections to judicial facilitation of solicitating lawsuit participation and joinder. In permitting a non-deceptive and non-judicially-supervised targeted mail solicitation from an attorney inviting potential clients to participate in a litigation, this Court necessarily ruled that a targeted solicitation which is supervised and facilitated by a district court would also be not improper. Thus, just as the *Cook* decision laid to rest the legislative history concerns of the Tenth Circuit in *Dolan*, so this Court's decision in *Shapero* laid to rest the barratry-based concerns reflected in the Ninth and Eighth Circuits in *Kinney* and *McKenna*, respectively.

Thus, in summary, as a result of (a) this Court's decision in *Shapero* and (b) the clarified understanding of the legislative history as set forth by the Federal and Third Circuits in *Cook* and *Sperling*, respectively, the twin structural girders upon which the Eighth, Ninth and Tenth Circuit minority decisions are squarely based have been virtually dismantled. Since the decisional law in this area has now been substantially clarified, little or no purpose would be served by this Court's intervention.

Petitioner's attempt to portray the several district court

decisions in this issue as somehow being in fundamental conflict is highly misleading. Conflict among the district courts is not a reason for this Court to grant certiorari — especially where, as at bar, the matter has been fully addresssed at the circuit court level. Moreover, in those district court decisions in which circulation of a court-authorized notice has been denied, the refusal has usually been based on the inappropriateness of notice under the particular circumstances of the case — not because the district court lacked the authority or the power to send out a notice. Of course, the issue of how such judicial discretion is to be exercised in a given case is not before this Court.

Indeed, there is no district court which holds that a district court *must* authorize notice in all cases and that certainly is not the holding of any of the Circuits comprising the majority viewpoint: The Second, Third, Seventh or Federal Circuits. In the view of all the Circuits allowing facilitation of notice, the district court's authority is always to be exercised in the context of their being an appropriate case, including one in which there is a showing that the claims of absent class members are "similarly situated" to the class action representatives, as is required by Section 216(b). Since the decision to allow a notice in an appropriate case has a built-in element of judicial discretion, there is no need for this Court to be concerned about an absence of complete uniformity in the Circuits.

IV.

THE VARIATIONS THEMSELVES IN THE WAY THAT THE CIRCUIT COURTS HAVE IMPLEMENTED THE MANNER IN WHICH A DISTRICT COURT FACILITATES NOTICE CONFIRMS THAT THE ISSUE AT BAR IS ONE INVOLVING JUDICIAL DISCRETION AND NOT A PURE QUESTION OF LAW.

Petitioner's attempt to highlight the minor differences in the way that the various circuits have addressed the question of the content of the notice serves only to point up that the real issue at bar is one not of judicial power but is one of how judicial discretion is to be exercised. The extent and manner by which a district court in a particular case believes it is appropriate under the circumstances to authorize the sending out of a notice to all potential opt-ins is a question involving only matters of judicial discretion. How that discretion will be exercised must necessarily vary from case to case. It is surely an issue wholly unsuitable or unnecessary for resolution by this Court.

For example, Petitioner has noted that the Seventh Circuit in *Woods* has directed that the notice of pendency to class members should not bear any judicial imprimatur, while the Third Circuit in *Sperling*, in contrary fashion, has allowed the district courts to include an express reference to court authorization in the notice. Because of variations such as this, in the way the notice is worded or sent out, Petitioner argues that the circuits are necessarily in disarray and need guidance from this Court (Petition at 10, 14).

Petitioner's argument is not merely overstated, it seems to establish precisely the opposite point. The fact that there are discretionary variations shows that the circuits are not in disarray but that the manner and content of the notice itself raise matters of judicial discretion, not pure questions of law. These minor

variations, which the Petitioner asserts provides a need for uniformity, in fact demonstrate that what is really in conflict is not any overriding issue of law, but merely the extent to which each circuit feels it is necessary or desirable to regulate the content of the notice and the manner in which the notice is to be distributed. These variations from circuit to circuit are not evidence of a deep conflict that needs to be made uniform; rather they are the routine by-product of the exercise of judicial discretion and administrative experimentation. Petitioner has made no showing that these variations need to be reconciled or that the non-uniformity is anything other than a reflection of judicial discretion.

V.

NO IMPORTANT QUESTION OF FEDERAL LAW IS RAISED WHICH REQUIRES ANY SUPERVISION BY THE COURT.

The issue for which certiorari is herein sought is indeed quite narrow. It affects, at most, only the relatively few private age discrimination *class* suits in which joinder has not been successfully effected by informal and non-judicially supervised means. These types of cases are not proliferating. Petitioner's assertion that this case impacts on every reduction in force or plant closing is a gross overstatement. The decision does not even affect most age discrimination class suits, let alone every individual age discrimination suit. The issue only arises in those few cases where some judicial facilitation is needed in locating absent class members.

Petitioner notes that the absence of express language in Section 216(b) is a reason for this Court to review this case. Of course, the mere fact that Section 216(b) happens to be silent on the question of a district court's authority to facilitate notice is

no reason why this Court must intervene. If absence of specific authorizing language in federal statute was a reason in itself for review by this Court, the number of cases presented for review would be legion. As Petitioner concedes, the issue at bar raises absolutely no question regarding due process of law for the reason that potential age discrimination grievants who do not opt-in to the suit are simply not bound by any judgment or settlement affecting the class as a whole. Thus, there is no compelling basis for this Court to exercise its supervisory powers herein.

Moreover, the issue which Petitioner asks the Court to review does not bear upon either the substantive rights or statutory entitlements of absent class members. The issue relates only to a matter of administrative facilitation. Whether or not the Court authorizes the sending out of a notice of pendency to persons who have not yet filed consent to join an action, this in no way expands or qualifies such person's substantive rights under the ADEA. The district courts should thus be allowed, through the exercise of their discretion, to develop a body of procedural guidelines in determining the appropriate circumstances and appropriate means for facilitating notice of a pending collective action.

Whatever conflict may exist presents little danger either of non-uniformity of treatment of individual claims or of impermissible forum shopping. Non-uniformity of treatment is not a threat because the substantive rights of neither the "absent" plaintiffs nor the defendant are in issue. The threat of forum shopping is also not present because a district court will certainly consider the residence and place of employment of absent class members in determining whether there has been a sufficient showing that they are similarly situated to the named plaintiffs and, hence, whether notice should be authorized. The Court will also consider the appropriateness of the forum in determining whether to facilitate notice.

VI.

A MISAPPLICATION OR MISREADING OF THIS COURT'S DECISION IN *SHAPERO*, IF ANY, IS NO REASON IN ITSELF FOR THIS COURT TO GRANT CERTIORARI.

Petitioner suggests that the Third Circuit acted in error in extending this Court's holding in *Shapero* beyond "mere advertising" to "soliciting direct joinder in an ongoing lawsuit" (Petition at 20).

Petitioner's argument for certiorari on the grounds is without merit for two (2) reasons: First, *Shapero* is not limited to "mere advertising". It explicitly deals with the targeted solicitation of persons urging them either to commence a new lawsuit or to join an existing one. Second, even if *Shapero* was somehow wrongfully interpreted by the Third Circuit in this case, that fact, in and of itself, provides no basis for review by this Court. The decision of the Third Circuit did not rest solely on an interpretation of *Shapero*; it was based on a host of considerations of which the *Shapero* decision was just one factor.

CONCLUSION

For the foregoing reasons, the Court should deny issuance of a writ of certiorari with respect to the judgment and opinion of the Third Circuit herein.

Respectfully submitted,

BEN H. BECKER
SCHWARTZ, TOBIA &
STANZIALE

LEONARD N. FLAMM
HOCKERT & FLAMM
Attorneys for Respondents

Dated: February 21, 1989

JOINT

APPENDIX

No. 88-1203 (4)

In The

Supreme Court of the United States

October Term, 1988

HOFFMANN-LA ROCHE INC.,

Petitioner,

vs.

RICHARD SPERLING, FREDERICK HEMSLEY AND JOSEPH ZELAUSKAS, Individually, and on behalf of all other persons similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

JOHN A. RIDLEY
CRUMMY, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE
One Gateway Center
Newark, New Jersey 07102
(201) 622-2235

Counsel for Petitioner

BEN H. BECKER
SCHWARTZ, TOBIA & STANZIALE
22 Crestmont Road
Montclair, New Jersey 07040
(201) 746-6000

Counsel for Respondents

PETITION FOR CERTIORARI FILED JANUARY 19, 1989
CERTIORARI GRANTED MARCH 20, 1989

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DOCKET ENTRIES

Date	No.	Pro eedings
5-8-85	1	Complaint *and jury demand,* filed 5-7-85.
6-13-85	11	*Answer* of deft. filed 6-12-85.
7-8-85	15	*First amended* complaint and *jury demand,* filed 7-8-85.
7-25-85	19	*Answer* of deft. to first amended complt., filed 7-23-85.
8-13-85	22	Notice of motion of pltf's requesting that claims asserted in the First Count of the First amended complt., and Third & Fourth Count of Complt. be asserted as a class action; and provide pltf's counsel with a complete list of the names and last known addresses of certain employees, etc., ret. 9-9-85, affidavit of Richard Sperling, affidavit of Ben H. Becker, affidavit of Leonard N. Flamm and proof of service, filed 8-13-85, (brief sub)
10-22-85	34	Withdrawal of consent to join action on behalf of David Chang, filed 10-21-85.
2-10-86	42	Notice of motion of deft. to declare invalid and vacate the consent to join forms; dismiss all claims as to those who have filed consent to join actions; and directing the Clerk to send each person who previously filed a consent a corrective notice and questionnaire, etc., ret. 3-24-86, fld 2-7-86. (brief sub)

Date	No.	Proceedings
2-10-86	47	Affidavit of Thomas P. MacMahon, filed 2-7-86.
2-10-86	49	Affidavit of H. Robert Koch and Robert M. Baron, filed 2-7-86.
12-8-86	78	Withdrawal of consent to join action of Joseph McConville, fld.
2-26-87	89	Consent to withdraw in action as to William J. Umbach, fld. At call for hearing on motion of pltfs. in limine to toll statute of limitations respects to claims under the Age Discrimination in Employment Act and claims under the New Jersey Law against Discrimination, Court indicated motion to be decided pursuant to Rule 78. (Haneke)
5-13-87	97	Consent to withdraw in action as to Frank Humiec, fld.
6-9-87	102	Consent of Alice P. Overbey to withdraw from action, fld.
6-15-87	103	Consent of Wisdom Malloy, Jr. to withdraw from action, fld.
6-22-87	104	Consent to withdraw in action as to Vivian Harrison, fld.
10-15-87	106	Minutes of 10-13-87 re hearing on motion by pltfs. for a de novo review of their motion for authorization to circulate notice of pendency, for class certification etc., decision reserved, fld. 10-14-87. (Ackerman)

Date	No.	Proceedings
1-5-88	108	Opinion, fld. (Ackerman)
1-5-88	109	Order denying deft's dismissal of or summary judgment on pltfs' disparate impact claims; granting pltfs' request for discovery from deft. of the names and addresses of absent count-one class members; granting in part and denying in part pltfs' request for court notice to absent count-one class members; denying pltfs' request for posting and publication of notice on deft's premises; deft's motion to invalidate the prior consents to join is denied and deft's request for corrective notice is denied as moot; deft's motion for court to decline pendent jurisdiction over count three is denied; deft's motion for court to decline pendent jurisdiction over count four is denied; stay of discovery are lifted and parties shall resume normal discovery, etc., fld. (Ackerman) n/m
1-20-87	110	Notice of motion by deft. for an amendment to the Court's order of 1-5-88 to certify for appeal, pursuant to 28 U.S.C. § 1292(b), brief and proof of service, fld. (Date to be set by court)
1-28-88	111	Minutes of 1-25-88 re: hrg. on motion by deft. for amendment to court order of 1-5-88 to certify for appeal, pur. to 28 U.S.C. § 292(b), opinion read into record, ordered motion denied in part, granted in part, OTBS fld. (Ackerman)

Date	No.	Proceedings
1-18-88	112	Amendment to court order of 1-5-88; granting motion of Hoffmann-La Roche to certify appeal, & staying transmission of Court's Order of 1-5-88 etc., fld. 1-25-88. (Ackerman) N/M
2-8-88	115	Notice of Appeal of deft., fld. 2-4-88 at 2:15 p.m.
2-8-88	116	Transcript of proceedings taken 1-25-88, fld. 2-2-88.
3-9-88	122	Certified copy of order from USCA granting motion for petition for leave to appeal fld. 3-78-88. (Misc. #88-8001)
3-9-88	123	Certified copy of order from USCA denying motion for petition for writ of mandamus fld. 3-7-88. (Misc. #88-3001)
3-15-88	125	Notice of appeal of deft. fld.

PETITIONER'S

BRIEF

No. 88-1203

In The

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October Term, 1988

HOFFMANN-LA ROCHE INC.,

Petitioner,

vs.

RICHARD SPERLING, FREDERICK HEMSLEY AND JOSEPH ZELAUSKAS, Individually, and on behalf of all other persons similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

JOHN A. RIDLEY
One Gateway Center
Newark, New Jersey 07102-5311
(201) 622-2235

Counsel of Record

Of Counsel:

HAROLD F. BOARDMAN, JR.
General Counsel
FREDERICK C. KENTZ, III
Assistant General Counsel
Hoffmann-La Roche Inc.
340 Kingsland Street
Nutley, New Jersey 07110
(201) 235-5000

RICHARD S. ZACKIN
MICHAEL P. HICKEY
STEPHANIE L. PERRY
CRUMMY, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE
A Professional Corporation
One Gateway Center
Newark, New Jersey 07102-5311
(201) 622-2235

Counsel for Petitioner

May 18, 1989

QUESTION PRESENTED

In a case brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, where the joinder in the action of persons other than the named plaintiffs is governed by 29 U.S.C. § 216(b), does the district court possess the authority to authorize and facilitate notice of the action to said persons who have not yet filed consents to join the action?

LIST OF PARTIES

The caption on the cover page to this brief sets forth all of the named parties to this proceeding. In addition to the named plaintiffs, at the time the petition was filed 408 persons had opted into the lawsuit by virtue of the filing of "Consents to Join Action", and were listed at pages ii-viii of the petition. No additional consents have been filed with the court since the petition was filed, and the list in the petition represents all opt-in parties to this action.

RULE 28.1 LIST

The Rule 28.1 list appears at page ix of the petition and is unchanged since that time.

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No. 88-1203

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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Third Circuit, 862 F.2d 439 (3d Cir. 1988), and the United States District Court for the District of New Jersey, 118 F.R.D. 392

(D.N.J. 1988), appear in the appendix to the petition at pp. 1a and 50a respectively.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on November 30, 1988. The petition for certiorari was filed on January 19, 1989 and granted by this Court on March 20, 1989. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

Section 16(b) of the Fair Labor Standards Act ("FLSA") codified at 29 U.S.C. § 216(b) and Section 7(b) of the Age Discrimination in Employment Act ("ADEA"), codified at 29 U.S.C. § 626(b) are the statutory provisions involved and are printed as an addendum at page A1, *infra*.

STATEMENT OF THE CASE

On February 4, 1985 the petitioner, Hoffmann-La Roche Inc. ("Roche"), implemented a reduction in force in which approximately 1,200 employees were terminated or demoted.[1] Shortly thereafter, a group of the affected employees, with assistance of ccunsel, formed a group known as R.A.D.A.R. (Roche Age Discriminatees Asking Redress). A letter dated March 7, 1985, was drafted by R.A.D.A.R. and its counsel, was signed by several R.A.D.A.R. members, and was sent to approximately 600 former employees. *Sperling*, 862 F.2d at 440. It was accompanied by a form of "Consent to Join Action" appropriate, upon execution, for filing in the district court. Pet. App. B,

1. Only a small number of the affected employees were demoted. Four demotees have opted-into this action.

47a-49a. The R.A.D.A.R. letter makes it clear that counsel planned to file an ADEA suit in the district court immediately upon completion of the statutorily mandated 60-day waiting period after the filing of an administrative charge with the Equal Employment Opportunity Commission ("EEOC").[2] *See* 29 U.S.C. § 626(d). The letter advised the former employees that an action would be brought alleging age discrimination and solicited written consents to join the action as plaintiffs. Pet. App. B, 42a-43a. To date, over 400 consents to join the action have been filed with the district court.

On May 7, 1985 a complaint was filed asserting, *inter alia*, age discrimination in violation of ADEA, 29 U.S.C. § 621, *et seq*. In the complaint, the three named plaintiffs sought to proceed on their own behalf and all person similiarly situated.

Upon the filing of the complaint, the R.A.D.A.R. group held a widely-publicized press conference. The lawsuit generally received extensive publicity in various publications, including area newspapers circulating within the locales where the affected employees reside. J.A., 3d Cir. Vol. 1, pp. 175a-181a. On August 13, 1985, plaintiffs moved for court authorized direct mail notice to all persons potentially similarly situated who had not yet filed written consents to join the action. Roche opposed that motion and cross-moved to vacate the "consents" theretofore filed, to dismiss the opt-in claims without prejudice, and for corrective notice to be sent to those persons who already had filed "consents." Roche asserted that the consents filed in response to the R.A.D.A.R. letter were violative of Rule 11, Fed. R. Civ. P., and invalid as a matter of law, thereby requiring vacation of the

2. On March 4, 1985 counsel had filed a charge with the EEOC in the name of Richard Sperling on behalf of himself and "all other HLR employees over the age of 40 similarly situated."

consents and transmittal of corrective notice.[3]

On January 5, 1988, the district court filed an Opinion and an Order which granted, in substantial part, plaintiffs' motion for court authorized notice and denied Roche's cross-motion to vacate the "consents" previously filed and for corrective notice. 118 F.R.D. at 415, Pet. App. C, p. 105a.

Roche thereafter filed a motion seeking an amendment of the district court's order of January 5, 1988, to certify for appeal, pursuant to 28 U.S.C. § 1292(b), those portions of the court's order granting plaintiffs' motion for court authorized notice to potential opt-in plaintiffs and denying Roche's cross-motion to invalidate the prior consents and for corrective notice. By Order dated January 25, 1988, the district court denied Roche's motion as to the issue regarding the vacation of the "consents" already filed and corrective notice, but granted Roche's motion to certify for appeal, pursuant to 28 U.S.C. § 1292(b), the question presented for review in this Court.

On March 2, 1988, the Third Circuit Court of Appeals granted Roche's petition for leave to appeal this question.[4] In an opinion

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3. Roche has never claimed that the affected employees were precluded from communicating among themselves or with counsel with respect to joinder in the suit.

4. Although the district court had declined to certify for appeal the issue of the validity of the consents to join the action previously filed, Roche sought to appeal this issue by (1) filing a petition for a writ of mandamus and (2) filing an appeal under the collateral order rule. The court of appeals denied the mandamus petition on March 2, 1988. The appeal under the collateral order rule was consolidated with the appeal on the certified question for purposes of briefing and argument. In its opinion filed on November 30, 1988, the court of appeals held that it did not have jurisdiction under the collateral order rule. 862 F.2d at 441-44. On December 21, 1988 Roche filed a petition for rehearing on this issue, which was denied by order dated January 9, 1989.

filed on November 30, 1988, the Third Circuit affirmed the district court, holding that "the district court does have the power to authorize notice to be sent to plaintiffs in an opt-in class filed under the Age Discrimination in Employment Act and to review the content of such notice before it is communicated to the class members." 862 F.2d at 448.

On December 20, 1988, Roche filed a motion seeking to stay the issuance of the mandate of the Third Circuit for 30 days. This motion was granted by Order entered on December 27, 1988. On January 19, 1989, Roche filed a petition for writ of certiorari in this Court, which was granted by the Court in its Order of March 20, 1989.

SUMMARY OF ARGUMENT

Roche maintains that the district court erred in this ADEA action when it (1) authorized notice of the action to former Roche employees affected by a reduction in force inviting their joinder and (2) ordered Roche to disclose the names and addresses of those former employees to facilitate their solicitation. The court had no authority under any statute or rule to so order.

The ADEA is enforced, in relevant part, through § 16(b) of the FLSA, 29 U.S.C. § 216(b). This provision permits an employee to bring suit on behalf of himself and other similarly situated employees but further provides: "No employee shall be a party plaintiff to any such action unless he gives his consent in writing . . . and such consent is filed in the court . . . ." No statutory provision authorizes courts to facilitate notice to non-parties, and the district court correctly acknowledged the inapplicability of Rule 23's notice provisions. Nonetheless, it determined it could "aid ADEA class plaintiffs in filling their class with all its possible members." 118 F.R.D. at 403.

The district court's action violates longstanding principles of judicial restraint and neutrality fundamental to our judicial system. The court, improperly, involved itself in the joinder of persons who are being solicited to maximize the number of money damage claims asserted against Roche. These persons are unnecessary to the proper adjudication of plaintiffs' age discrimination claims.

Northwest Airlines, Inc. v. Transportation Workers Union of America, AFL-CIO, 451 U.S. 77, 93-94 (1981), held that the "comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies." The ADEA and the FLSA contain carefully crafted enforcement schemes. The district court's action in this case upsets the balance which Congress sought to achieve.

This conclusion is reinforced by the relevant legislative history. Under § 16(b), as originally framed by Congress, an individual employee could sue on behalf of other employees similarly situated. In 1947, Congress revisited this enforcement mechanism. It determined that, in practice, the statutory scheme placed unfair burdens on *employers*. A single employee could sue on behalf of thousands of others whose identities were not disclosed to the employer and who may not have consented to the suit. In addition, if the employer was found liable, previously unidentified employees could intervene even after the limitations period (under state law) had expired.

Through the Portal-to-Portal Act, Pub. L. No. 49, 61 Stat. 84 (1947), Congress made significant amendments in the enforcement scheme of the FLSA to relieve employers from these burdensome litigation tactics. Among these measures was the "opt-in" amendment to § 16(b) which mandated that each employee seeking a recovery come forward by filing a written consent; and a uniform limitations period was adopted which was not to be

tolled as to any employee until the consent was filed.

The legislative history of these amendments is replete with evidence of Congress' awareness of the successful methods used by employees, without court assistance, to notify fellow workers of their potential claims. Nowhere in the legislative history is there any indication of a congressional interest in facilitating notice to *employees* — through the courts or otherwise. Thus court facilitated notice would, without any justification, transform a provisions, intended to provide relief to *employers*, into a vehicle which furthers the strategic objectives of plaintiffs and their counsel by bringing to bear on the litigation the greatest number of claims possible.

Prior to 1966, Rule 23 did not authorize notice to potential claimants of the commencement of a class action; and as of that time no reported court decision supported notice in § 16(b) cases. The 1966 amendments to Rule 23 provided for notice that a class action has been certified, but Congress deliberately left § 16(b) unaffected by these and the other amendments to the rule adopted at that time.

One year later, Congress selected the enforcement mechanism of the FLSA, including § 16(b), for the ADEA. Here again, there is nothing in the legislative history which in any way supports the district court's action or suggests that Congress either intended to, or perceived any need to change prior practice under § 16(b) in incorporating FLSA enforcement provisions into the age discrimination law.

The arguments made in support of notice are unpersuasive:

The "remedial statute" canon of statutory construction cannot be used to create a provision which Congress did not enact. In addition, there is no evidence that the legislation enacted by

Congress requires any judicial tampering to fully realize the law's objectives.

Neither are there any legitimate "case management" concerns which justify court involvement. The courts are equipped, with much more efficient and well-tested means, to deal with any "multiplicity of suits" concerns. Age discrimination claims of the type presented by this case are especially troublesome in terms of effective case management because they are not conducive to efficient adjudication on a "class" basis. Court facilitated notice does nothing but increase the number of these claims and the complexities of case management.

This Court's recent decision in *Shapero v. Kentucky Bar Assoc.*, 486 U.S. ____, 100 L.Ed. 475 (1988), precluding blanket prohibition of targeted written solicitation by attorneys, does not justify judicial facilitation of joinder in § 16(b) cases under the guise of regulating the content of the solicitation notice.

The judicial system is best served when courts act with restraint and with neutrality towards the parties that come before them. Judicial involvement in the solicitation of claims, even if well intended, violates these principles, is without basis in law, and does not promote proper and efficient adjudication of the claims already before the court.

ARGUMENT

INTRODUCTION

Section 7(b) of the ADEA, 29 U.S.C. § 626(b), incorporates by reference certain enforcement procedures of the FLSA, including *inter alia*, the FLSA's § 16(b) private right of action provision, 29 U.S.C. § 216(b). In relevant part § 16(b) states:

> . . . An action . . . may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

Section 16(b) nowhere by its terms authorizes the judiciary to facilitate[5] notice to nonparties. Thus the issue presented by this case is whether, notwithstanding Congress' silence, § 16(b) or some other source of federal judicial power nonetheless permits a district court to authorize or otherwise facilitate notice of the pendency of an ADEA action to nonparties to invite their joinder in the suit.

Notice is, of course, authorized in class actions governed by Rule 23 of the Federal Rules of Civil Procedure, but "there is a fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by FLSA § 16(b)." *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975). Due process considerations dictate that notice be utilized in Rule 23 class actions to advise class members that unless they exercise their right to "opt-out" of the suit, they will be bound

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5. The term "facilitate" will be used throughout this brief. In the district court, plaintiffs sought an order directing (i) that Roche disclose the names and addresses of all employees coming within plaintiffs' class definition, (ii) that notice of the action together with a "Consent to Join Action" form be mailed to all those so identified, and (iii) that Roche post notices of the suit on company bulletin boards and publish such notices in company newspapers. Court "facilitation" of notice as used in this brief encompasses each of these requested remedies as well as any other use of judicial power, the purpose of which is to assist plaintiffs and their attorneys in their efforts to solicit additional complainants to seek damages against Roche.

by the court's judgment, whether favorable or unfavorable. *McKenna v. Champion International Corp.*, 747 F.2d 1211, 1213 (8th Cir. 1984). It is now well settled that the requirement that a written consent be filed by each person on whose behalf suit purports to be brought, (the "opt-in" procedure), in an action governed by § 16(b), obviates due process concerns and precludes class action disposition of ADEA[6] cases under Rule 23. *Id.* at 1213; *Dolan v. Project Const. Corp.*, 725 F.2d 1263, 1266 (10th Cir. 1984); *LaChapelle*, 513 F.2d at 288-89.

The district court below acknowledged the inapplicability of Rule 23 and its notice provisions to this ADEA action, 118 F.R.D. at 399, and thus that court boldy framed the issue in terms which bespeak judicial activism, to wit:

> [M]ay a court offer the mechanisms of judicial process to aid ADEA class plaintiffs in filling their class with all its possible members?

Id. at 400. The court then answered this question in the affirmative, justifying the result on the basis of a perceived social utility. *Id.* at 403. *See* the discussion, *infra*, at 30-35.

In so doing the district court ignored the fundamental principle, accepted throughout the history of our judicial system, that courts assert power only after litigants bring claims before them. *See Osborne v. Bank of the United States*, 22 U.S. (9 Wheat.) 326 (1824) (Marshall, C.J.) (dictum). "Our long standing

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6. Inasmuch as this is an ADEA action, § 16(b)'s governance of that Act will be our primary focus. It should be noted, however, that § 16(b) is likewise applicable to FLSA, 29 U.S.C. § § 201 *et seq.*, and Equal Pay Act, 29 U.S.C. § 206(d), Walsh-Healey Act, 41 U.S.C. § 35 *et seq.* and Bacon-Davis Act 40 U.S.C. § 276 a *et seq.*, suits.

traditions bar judges from conscripting parties so as to generate an adversary confrontation. This tradition may be extended into rules that limit the power of judges to broaden an action by expanding the list of parties . . . " 13 Wright, Miller & Cooper, *Federal Practice and Procedure*, 2d, § 3530 at 312 (1986). *See generally*, Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 385-86 (1978) (arbiter should not initiate the adjudicative process).

The district court also disregarded the principle of the neutrality of the courts, a principle which is absolutely essential to the continuity and success of our system of jurisprudence.[7] The conjunctive nature of these bedrock principles of judicial restraint and neutrality has been well-stated by John Chipman Gray, as follows:

> The essence of a judge's office is that he shall be impartial, that he is to sit apart, is not to interfere voluntarily in affairs . . . but is to determine cases which are presented to him.

J.C. Gray, *The Nature and Sources of the Law*, 114-15 (2d ed. 1921), (*quoted in* Fuller, *supra*, at 385).

Nevertheless, in recent years attorneys in ADEA suits, and other actions governed by § 16(b), have attempted, with some success, to implement a strategy of mass joinder of non-litigants

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7. By way of example, dismissals of claims by courts *sua sponte* are not favored because "they cast the district court in the role of a proponent rather than an independent entity." *Munz v. Parr*, 758 F.2d 1254, 1257-58 (8th Cir. 1985); *Tingler v. Marshall*, 716 F.2d 1109, 1111 (6th Cir. 1983); *Franklin v. Oregon State Welfare Division*, 662 F.2d 1337, 1342 (9th Cir. 1981). Court involvement in the solicitation of claims for money damages against a party to a dispute would appear to be significantly more partisan.

by enlisting the sponsorship of the courts in authorizing and facilitating notice inviting potential claimants to join their ongoing suits. The prospect of judicially facilitated solicitation has even arisen in suits in which § 16(b)'s opt-in provision was not implicated.[8]

The role plaintiffs here propose *for* the judiciary would involve the courts in maximizing the solicitation and joinder of additional parties seeking money damages.[9] None of these additional claimants are necessary parties for the proper adjudication of plaintiffs' asserted claims. Thus court facilitated notice serves no proper judicial function and serves only to advance plaintiffs' strategic objectives.

It will be demonstrated in Point I that the comprehensive enforcement scheme of the FLSA, selected by Congress for the ADEA, precludes any finding of implied congressional authority for court facilitated notice. Point II demonstrates that such notice cannot be inferred from the legislative history of either the FLSA or the ADEA. In Point III, the "remedial statute" rationale relied

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8. In *Pan American World Airways, Inc. v. U.S. Dist. Ct.*, 523 F.2d 1073 (9th Cir. 1975), the court granted mandamus sought by defendants, including *inter alia*, the United States, in a case where no Rule 23 class issues controlled, to preclude the district court from ordering discovery of the names and addresses of victims of several airplane crashes, or their next-of-kin, so that they might be notified of the pendency of tort actions arising out of the crashes.

9. Maximizing the number of claimants in turn maximizes the leverage to exact favorable settlement terms and the potential award of counsel fees. When the court facilitates this strategy, it no longer serves as a neutral arbiter of the dispute. Thus unless *compelled* by the language of a statute, a court should refrain from facilitating notice. In the present case, by exercising this restraint, the court correctly "take[s] the statute as Congress wrote it," and properly avoids furthering a strategy of claims maximization. *See Reiter v. Sonotone*, 442 U.S. 330, 345-46 (1979) (Rehnquist, J., concurring).

upon by the courts below is addressed and refuted. Finally, Point IV addresses certain policy issues regarding case management and the regulation of solicitation. The discussion there will demonstrate that these issues provide no basis for court facilitation of notice.[10]

I.

THE COMPREHENSIVE ENFORCEMENT SCHEMES OF THE FLSA AND THE ADEA PRECLUDE A FINDING OF IMPLIED CONGRESSIONAL AUTHORITY FOR COURT FACILITATED NOTICE.

As this Court has consistently stated: "In matters of statutory construction, it is appropriate to begin with the language of the statute itself." *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 91 (1981), *citing Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). Neither § 16(b) nor any other provision of the FLSA or the ADEA expressly authorizes the court to assist plaintiffs in enlarging an ADEA suit by facilitating notice to potential opt-ins. This congressional silence, although not dispositive, is clearly an important factor. *See Northwest Airlines*, 451 U.S. at 94; *National Labor Relations Board v. Plasterers' Local Union No. 79*, 404 U.S. 116, 129 (1971). Given the issue here — the "extraordinary" concept of court facilitated notice to potential plaintiffs "*not authorized explicitly by statute or rule*"[11] - congressional authorization cannot properly

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10. This three-step process of statutory analysis — examination of statutory language, review of legislative history, and consideration of policy objectives — is customary with the Court. *See, e.g., Mohasco Corp. v. Silver*, 447 U.S. 807, 815 (1980).

11. *See Schmidt v. Fuller Brush Co.*, 527 F.2d 532, 535 (8th Cir. 1975), *quoting Pan American World Airways*, 523 F.2d at 1076 (emphasis added).

be implied from the opt-in procedure absent clear evidence of congressional intent.[12] *See Kennedy v. Whitehurst*, 690 F.2d 951, 962 (D.C. Cir. 1982).

In the absence of definitive statutory language to support their position, those advocating court facilitated notice must find clear support in the statutory structure and legislative history. *See, e.g., Northwest Airlines*, 451 U.S. at 94; *Plasterers' Local Union*, 404 U.S. at 130 (both cases involving statutes regulating businesses in their capacities as employers). In fact, however, the structure and legislative history (the latter to be discussed in Point II, *infra* at 19) of both the FLSA and the ADEA belie any contention that Congress has impliedly authorized notice in cases governed by § 16(b).

In *Northwest Airlines*, the Court, in rejecting the contention that either the Equal Pay Act, 29 U.S.C. § 206(d), or Title VII, of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Title VII) implicitly authorizes an action for contribution by an employer against a labor union, pointed to the structure of the statutes:

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12. The approach taken by the Third Circuit below, 862 F.2d at 447, that notice facilitation is permitted because "the silence of the legislative history on the question of notice" imposes no "bar" to court authorized notice, stands the correct principle of statutory construction on its head. *See* the discussion *infra*, at 19. Other courts have engaged in this type of misguided analysis. *See, e.g., United States v. Cook*, 795 F.2d 987, 993 (Fed. Cir. 1986) (legislative history does not indicate that Congress intended "to *forbid*" district courts from ordering disclosure of names and addresses to faciliate notice to potential opt-ins) (emphasis added).

The proper analytical approach was employed in *Pan American World Airways*, 523 F.2d at 1077, where the court, noting that: "Traditionally in our judicial system, courts are powerless to act until litigants bring claims before them", reviewed the arguments of the proponents of notice to determine whether notice "was permitted by an ascertainable source of judicial power."

> The structure of the statutes . . . counsels against recognition of the implied right petitioner advocates in this case. The Equal Pay Act and Title VII establish comprehensive programs designed to eliminate certain varieties of employment discrimination. The statutes make express provision for private enforcement in certain carefully defined circumstances, and provide for enforcement at the instance of the Federal Government in other circumstances. *The comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies.* It is, of course, not within our competence as federal judges to amend these comprehensive enforcement schemes by adding to them another private remedy not authorized by Congress.

451 U.S. at 93-94 (emphasis added). This language is equally applicable to the ADEA and the FLSA.[13] Both statutes "provide for enforcement at the instance of the federal government." Under the ADEA, the EEOC is empowered to conduct investigations and to bring civil actions on behalf of employees.[14] An employee's

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13. In fact, a central feature of the enforcement scheme incorporated in the Equal Pay Act, namely, § 16(b), *supra*, is also a central feature in the enforcement scheme under the ADEA and the FLSA. *See also Lorillard v. Pons*, 434 U.S. 575, 577 (1978) ("[ADEA's] enforcement scheme . . . is complex — the product of considerable attention during the legislative debates."); *Zombro v. Baltimore City Police Dept.*, 868 F.2d 1364, 1366 (4th Cir. 1989) ("ADEA provides a comprehensive statutory scheme to prohibit discrimination"); *Breitwieser v. KMS Ind., Inc.*, 467 F.2d 1391, 1392 (5th Cir. 1972) ("[T]he FLSA . . . contains a comprehensive enforcement scheme.")

14. The ADEA's government enforcement scheme stands in sharp contrast to the virtually toothless provisions of Title VII as enacted in 1964. (Cont'd)

right to bring suit terminates upon commencement of an action by the EEOC, 29 U.S.C. § 626(a),(c)(1).[15] Under the FLSA, the Secretary of Labor has the power to bring civil actions for unpaid wage or overtime compensation violations, 29 U.S.C. § 216(c), and may institute injunction proceedings, 29 U.S.C. § 217.[16]

With regard to private enforcement, both statutes provide comprehensive remedial schemes, including recovery of lost wages, injunctive relief, liquidated damages, and counsel fees, 29 U.S.C. § 626; 29 U.S.C. §§ 216, 217. In addition, the ADEA requires the filing of an administrative charge prior to a private party initiating court action. 29 U.S.C. § 626(d).

Further evidence of Congress' comprehensive scheme is the express provision in the ADEA for the conspicuous posting of notice by employers, employment agencies and labor organizations to advise employees of their rights under the statute. 29 U.S.C. § 627; *see* 29 C.F.R. § 1627.10. On the other hand, Congress, in enacting the ADEA, failed to provide for notice emanating from the court; and for the 30 years prior to the enactment of

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(Cont'd)
Until 1972, the EEOC's function under Title VII was limited to "investigation" and "conciliation." *Occidental Life Ins. Co. v EEOC*, 432 U.S. 355, 358-59 (1977).

15. No civil action may be commenced by an individual until 60 days after filing a charge with the EEOC, thus giving the Commission the opportunity to seek to eliminate any alleged unlawful practice by conciliation, 29 U.S.C. § 626(d).

16. Here too, the right of an individual to institute a suit for damages terminates upon the filing of suit by the Secretary, 29 U.S.C. § 216(c). The Wage and Hour Division, Employment Standards Administration, of the Department of Labor has issued regulations requiring employees to maintain employment records to aid in enforcing the wage and pay requirements of the FLSA. *See* 29 C.F.R. §§ 516.0-516.9.

the ADEA there is *no* reported instance of a court authorizing or in any way facilitating notice under § 16(b).

Courts are not permitted to usurp congressional authority to decide which provisions, if any, are to be included in a statute to encourage private litigation (*e.g.*, liquidated damages, counsel fees). Courts cannot create such provisions "whenever the courts deem the public policy furthered by a particular statute important enough to warrant [them]." *Alyeska Pipeline Serv. Co. v. Wilderness Soc.*, 421 U.S. 240, 263 (1975).[17]

Here, Congress has provided comprehensive enforcement schemes for both FLSA and ADEA cases. These schemes simply do not provide for enforcement through notice from the court to potential plaintiffs. In this regard, the oft-cited remarks of Senator Javits, a leading sponsor of the ADEA, explaining the proposed incorporation of the FLSA enforcement procedures into the ADEA, should be noted:

> We now have the enforcement plan which I think is best adapted to carry out this age-discrimination-in-employment ban *with the least overanxiety or difficulty on the part of American business and with complete fairness to the workers*. I think that is one of the most important aspects of the bill.

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17. As noted above, the district court below framed the issue as whether the court could "aid" the plaintiffs by "filling their class" with all potential members. 118 F.R.D. at 400. In this regard, courts attempting to justify judicial notice have done so under a "remedial" construction of the statute. These courts have, however, completely misconstrued the "remedial statute" canon of statutory construction. *See* Point III, *infra*, at 30.

113 Cong. Rec. 31254 (1967) (emphasis added).[18] Clearly, the courts should not disturb the equilibrium of the ADEA statutory scheme which Congress believed appropriate to balance and serve the interests of both employers and employees. As this Court recognized in *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980), "[E]xperience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of even-handed administration of the law." Again, *Northwest Airlines*, is instructive:

> In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt . . . . *The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.* . . .

451 U.S. at 97 (emphasis added). In light of the ADEA's comprehensive enforcement scheme, which includes the time-tested procedures of § 16(b), any contention that § 16(b) somehow impliedly authorizes court facilitated notice of the commencement of an action to potential plaintiffs must be rejected, unless there is clear support for it in the legislative history. There is, however, no such authority to be found in the applicable legislative history, to which we now turn.

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18. These remarks have been noted in *Reich v. New Industries Co.*, 570 F.2d 363, 373 (2d Cir.), *cert. denied*, 439 U.S. 1086 (1978); *Hays v. Republic Steel Corp.*, 531 F.2d 1307, 1311 (5th Cir. 1976); *Nance v. Bank of California*, 72 F.R.D. 550, 555 (N.D. Cal. 1976); and *Cowden v. Griffin Television, Inc.*, 421 F. Supp. 841, 845 (W.D. Okla. 1976).

B.

IMPLIED CONGRESSIONAL AUTHORIZATION OF COURT FACILITATED NOTICE IS BELIED BY THE LEGISLATIVE HISTORY OF THE FLSA AND THE ADEA.

A review of the legislative history of the enforcement procedures of the original FLSA, the critical Portal-to-Portal Act amendments thereto,[19] and the ADEA itself, belies any argument that congressional authority exists for court facilitated notice. In addition, for reasons apparent from the discussion below, this conclusion is supported by the practice under Rule 23 as originally adopted and by the significant 1966 amendments to that Rule.

A. The 1938 Act.

As originally enacted in 1938, § 16(b) provided that a private action could be commenced (1) by individual employees either on behalf of themselves or themselves and "other employees similarly situated," or (2) by a designated non-employee "agent or representative" on behalf of "all employees similarly situated." Pub. L. No. 718, § 16(b), 52 Stat. 1060, 1069 (1938). The statute mandated an award of liquidated damages in an amount equal to any unpaid minimum wages or unpaid overtime compensation. *Id.* The statute provided no special limitations period, and the courts borrowed the most closely analogous state statute of limitations. These state statutes provided periods of limitations ranging anywhere from 1 to 10 years. *See* Note, *Limitation of Actions Under Section 16(b) of the Fair Labor Standards Act*, 47 Colum. L. Rev. 444, 445-47 (1947). *See also* S. Rep. No. 37, 80th Cong., 1st Sess. 48 (1947).

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19. Pub. L. No. 49, 61 Stat. 84 (1947).

B. The Portal-to-Portal Act Amendments.

In 1947, Congress dramatically revised the FLSA's private-enforcement provisions as part of the Portal-to-Portal Act amendments to the 1938 Act.[20] The impetus for these revisions was congressional concern that the enforcement scheme as originally enacted placed undue burdens on employers. Specifically, there was concern over employers being faced with suits brought by a single employee, ostensibly on behalf of thousands of fellow employees whose identities were not disclosed, with no assurance that the plaintiff had the consent of the employees on whose behalf suit was instituted. 93 Cong. Rec. 2176, 2182 (1947)(statement of Sen. Donnell). Another danger posed by the original statute was that large numbers of employees could intervene in an action brought by a single employee after a determination on liability and thus evade the bar of the applicable state statute of limitations. 93 Cong. Rec. at 2182 (1947) (statement of Sen. Donnell). In addition, in Congress' view, permitting suit to be instituted by a non-employee agent or representative posed the threat of "stirring up litigation" with the potential for "unwholesome champertous situations". *Id. See also* S. Rep. No. 37, 80th Cong., 1st Sess. 40-41 (1947); S. Rep. No. 48, 80th Cong., 1st Sess. 40-41 (1947). It was further believed that because of the absence of a uniform statute of limitations, those employers who were exposed to suit for shorter periods obtained an unfair competitive advantage over employers in states with longer periods of limitations. 93 Cong. Rec. at 2184 (statement of Sen. Donnell).

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20. The Portal-to-Portal Act was triggered by *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), which validated claims for unpaid wages for employee activities not previously recognized as within the coverage of the FLSA. H. R. Rep. 71, 80th Cong. 1st Sess. pt. 2, at 3 (1947). *See also Dolan*, 725 F.2d at 1266-1267. The Act effectively eliminated these so-called "portal-to-portal" claims. Pub. L. No. 49, § 1, 61 Stat. 84 (1947), 29 U.S.C. § 251. Congress also revisited the FLSA's enforcement procedures and found them wanting in several respects as discussed in the text, *infra*.

Finally, the above described mandatory award of liquidated damages was viewed as unjust. H. R. Rep. No. 71, 80th Cong., 1st Sess. 3 (1947).[21]

The Portal-to-Portal Act was intended to provide relief to *employers* from these unfair burdens perceived by Congress. Four principal provisions were enacted to achieve this goal:

First, notice to the employer of the identity of the employees actually seeking a recovery was provided by amending § 16(b) to require any employee who wished to join the named plaintiff(s) as a party to file a written consent with the court to join the action. 93 Cong. Rec. at 2182 (statement of Sen. Donnell); H. R. Conf. Rep. No. 326, 80th Cong., 1st Sess. at 5, 13 (1947). *See also Anderson v. Montgomery Ward & Co., Inc.*, 852 F.2d 1008, 1016 (7th Cir. 1988) ("One of the chief purposes behind [the opt-in] provision was to prevent the filing of claims on behalf of a large group of unnamed and nonparticipating plaintiffs."). Only employees who filed consents were entitled to recover against the employer. *McKenna*, 747 F.2d at 1214.

Second, a specific statute of limitations of two years (three years for "bad faith" violations) was adopted, 29 U.S.C. §§ 255, 256, shortening the limitations period for the great majority of employees covered by the statute. S. Rep. No. 48, 80th Cong., 1st Sess. pt. 2, at 7 (1947). This limitations period was not to be tolled for any employee not named in the complaint until the employee filed with the court a written consent to join the action, 29 U.S.C. § 256. *See also Gibbons v. Equitable Life Assur. Soc. of the United States*, 173 F.2d 337, 339 (2d Cir. 1949) ("The terms

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21. For a further discussion of the burdens placed on employers by the practices under the original § 16(b), *see Deley v. Atlantic Box & Lumber Corp.*, 119 F. Supp. 727, 728 (D.N.J. 1954).

of the Portal-to-Portal Act indicate that one of its aims was to prevent the assertion of surprise claims by unnamed employees at a time when the statute of limitations would otherwise have run.").

Third, § 16(b) was amended to eliminate the right of a non-employee "agent or representative" to bring suit on behalf of similarly situated employees.[22] H. R. Conf. Rep. No. 326, 80th Cong., 1st Sess. 13 (1947).

Fourth, awards of liquidated damages were limited to violations committed in "bad faith and without reasonable grounds." H. R. Rep. No. 71, 80th Cong., 1st Sess. 15 (1947).

There is nothing in the legislative history of the Portal-to-Portal Act which supports the concept of court facilitated notice. To the contrary, there is significant evidence in its legislative history that Congress did not perceive any need for such notice. In this regard, Congress was acutely aware of the great success of the methods used in many instances by employees to notify fellow workers of their potential claims and to generate lawsuits on behalf of large numbers of employees.[23] It is also clear that the sponsors

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22. *See also, Arrington v. National Broadcasting Co.*, 531 F. Supp. 498, 502 (D.D.C. 1982).

23. *Portal-to-Portal Wages: Hearings on S. 70 before a Subcomm. on the Judiciary Senate*, 80th Cong., 1st Sess. 22-35 (1947) (statement of Sen. H. Capehart). *See also id.* at 805, 802-806 (statement of W. Montague); *id.* at 700-701 (statement of Sen. L. O'Daniel); *id.* at 614-615 (statement of W. Foster, Undersec. Dept. of Commerce); *id.* at 280-87 (statement of J.J. Pickeral, Textile Workers Union); *id.* at 812-13 (statement of D. O'Hara, Nat. Petroleum Assoc.); *id.* at 111 (statement of R. Smethurst, Counsel, Nat. Assoc. of Manufact.); *Regulating the Recovery of Portal-to-Portal Pay, and for Other Purposes: Hearings on H.R. 584 and H.J. Res. 91 Before Subcomm. No. 2 on the Judiciary*, H. Rep., 80th Cong., 1st Sess. 274-275 (1947) (statement of J. Kidde, Pres., Walter Kidde & Co., Inc.), *id.* at 173 to 201; S. Rep. No. 37, 80th Cong., 1st Sess. 13-25 (1947).

and proponents of the Portal-to-Portal Act amendments viewed these activities with disapprobation.[24]

The legislative history thus refutes rather than supports court facilitated notice. The purpose of such notice and the objective of those who seek it is to promote joinder. The legislative history, however, does not reflect the slightest congressional concern for getting notice out to potential opt-ins or otherwise promoting their joinder in the action. Rather, it is clear from that history that the primary congressional concern was to provide *notice to employers* of the identity of those claiming against them and ensuring strict compliance by employees with the statute of limitations.[25] As ultimately framed by Congress, § 16(b) cannot in any way be viewed as a mechanism through which Congress intended courts to promote the solicitation of opt-ins.[26]

In this regard, *Plasterers' Local Union*, is highly instructive. There, at issue was whether employers had the right to participate

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24. *See* note 23, *supra*.

25. The legislative history clearly reflects the congressional intent that notwithstanding the prevailing class action practice under Rule 23 of tolling the statute of limitations for class members not named in the complaint, *see* Comment, *The Spurious Class Suit: Practical Problems Confronting Court and Counsel*, 53 Nw.U.L.R. 627, 633 (1958), the opt-in procedure would require each claimant to satisfy statute of limitations requirements, whether the action was commenced as a collective action under § 16(b) or as a class action under Rule 23 as it then read. H. R. Conf. Rep. No. 326, 80th Cong., 1st Sess. 14 (1947). Clearly, Congress was not interested in promoting large class-type actions in § 16(b) cases.

26. The comment of Senator Donnell cited by the court of appeals below, 862 F.2d at 446, that Congress had "no objections" to retaining some form of collective action procedure, hardly constitutes evidence of a congressional desire that courts actively become involved in promoting the multiple joinder of plaintiffs.

in hearings held pursuant to § 10(k) of the National Labor Relations Act, 29 U.S.C. §§ 141, 160(k), for the purpose of resolving jurisdictional disputes between labor unions. The statute itself neither expressly permitted nor precluded employer participation, but referred only to undefined "parties" to the dispute. Looking to the intent of the statute, this Court held:

> It is clear that Congress intended to protect employers and the public from the detrimental economic impact of 'indefensible' jurisdictional strikes. It would, therefore be myopic to transform a procedure that was meant to protect employer interests into a device that could injure them. In the absence of an 'unmistakeable directive,' the Court has refused to construe legislation aimed to protect a certain class in a fashion that will run counter to the goals Congress clearly intended to effectuate.

Plasterers' Local Union, 404 U.S. at 130. The Court thus concluded that the employer was a "party" to the dispute permitted to participate in the 10(k) process. *Id.*[27]

Here, it would be equally "myopic" to view the opt-in procedure of § 16(b) as implicitly authorizing court facilitated notice to potential plaintiffs. To so construe the statute would be to transform a procedure that was intended by Congress to protect employers from burdensome litigation tactics into "a device that could injure them" by promoting similar tactics. Congress no doubt would have been shocked by the suggestion that the opt-in requirement it wrote into § 16(b) as part of a limitation

27. It should also be noted that the Court limited its statutory analysis to defining a term, *i.e.*, "parties", used by the legislature. It did not add an entirely new feature to the enforcement mechanism enacted by Congress.

on private rights of joinder somehow provides a basis for greatly enlarging pending suits through court facilitated notice to potential opt-ins.

It is completely illogical to suggest that because Congress in 1947 did not expressly preclude court facilitated notice it impliedly approved it. Moreover, that such notice is not addressed in the legislative history of the Portal-to-Portal Act amendments to the FLSA is neither surprising nor suggestive of congressional approval. At the time of these amendments, there were *no* reported court decisions supporting or even noting the concept of court facilitated notice to similarly situated employees in FLSA actions. Clearly, congressional silence as to what was a non-issue cannot be viewed as implied congressional approval of court facilitated notice. *See Albernaz v. United States*, 450 U.S. 333, 341 (1981) ("Congress cannot be expected to specifically address each issue of statutory construction that may arise.").

C. Rule 23.

The history of Rule 23 provides additional evidence that there has been no congressional perception of a need for court facilitated notice in actions under § 16(b). As originally enacted, the Rule provided, *inter alia*, for a "spurious" class action where, as under the opt-in procedure of § 16(b), only those members of the "class" who actually intervened in the action were entitled to the benefits of, and were bound by, the judgment.[28] At the time of the 1966

28. Rule 23 in the form it existed in 1947 likewise provided no basis for suggesting implied congressional approval of court notice to potential FLSA claimants. Until amended in 1966, the Rule did not provide for notice of the certification of a class action to class members. There was also considerable doubt expressed that an FLSA action could even be brought as a class action under Rule 23. *See, e.g., Smith v. Stark Trucking, Inc.*, 53 F. Supp. 826, 828 (N.D. Ohio 1943). *Wright v. United States Rubber Co.*, 69 F. Supp. 621, 624 (Cont'd)

amendments to the Rule, there were no reported court decisions supporting court facilitation of notice of the commencement of an action either in cases governed by § 16(b) or in spurious class actions under Rule 23.[29]

The concept of court facilitated notice of the certification of a class action was addressed by Congress for the first time in the 1966 amendments.[30] As a result of these amendments, notice

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(Cont'd)
(S.D. Iowa 1946); *Fowkes v. Dravo Corp.*, 62 F. Supp. 361, 362 (E.D. Pa. 1945); *Lofther v. First National Bank of Chicago*, 45 F. Supp. 986, 987-988 (N.D. Ill. 1941); *Saxton v. W.S. Askew, Co.*, 35 F. Supp. 519, 520-521 (N.D. Ga. 1940); Rahl, *The Class Action Device and Employee Suits Under the Fair Labor Standards Act*, 37 Ill. L. Rev. 119, 128-131 (1942). The original Rule 23 provided for "true," "hybrid," and "spurious" class actions. *See* Note, *Developments in the Law, Multiparty Litigation in the Federal Courts*, 71 Harv. L. Rev. 874, 928-943 (1958) for the definitions of these classes. The opt-in procedure of amended § 16(b) is akin to a spurious class action because only those parties who actually intervene in the spurious class action are bound by the judgment. *All American Airways v. Elderd*, 209 F.2d 247, 248 (2d Cir. 1954); *Oppenheimer v. F.J. Young & Co.*, 144 F.2d 387, 390 (2d Cir. 1944); Moore, *Federal Class Actions-Jurisdiction and Effect of Judgment*, 32 Ill. L. Rev. 555, 561 (1958). As was true for FLSA cases, as of 1947 there were *no* reported court decisions supporting the concept of court facilitated notice to potential class members of the commencement of a spurious class action under Rule 23.

29. As originally drafted, Rule 23 only expressly authorized notice in the event of a proposed dismissal or compromise. *See, e.g., Derdiarian v. Futterman Corp.*, 38 F.R.D. 178 (S.D.N.Y. 1965). For the spurious class action, such notice was not mandatory and was "probably . . . of little utility." *Developments in the Law*, *supra*, 71 Harv. L. Rev. at 932-933.

30. The 1966 amendments also for the first time set forth specific prerequisites to the maintenance of any class action (*i.e.*, numerosity of class members, commonality of questions of law or fact, typicality of claims and adequacy of representation). *See* Rule 23(a).

to class members of a class certification is now authorized in essentially two situations. First, in cases where the class is certified pursuant to Rule 23(b)(3),[31] each class member is bound by the judgment unless he or she elects to be excluded from the action. *See* Rule 23(c)(2). The Rule requires notice to the class, *see id.*, as a matter of due process to ensure that potential "opt-outs" are aware of their rights. *See, e.g., McKenna*, 747 F.2d at 1213; *Dolan*, 725 F.2d at 1266. Second, in class actions maintained under either Rule 23(b)(1) or Rule 23(b)(2) the district court may, in its discretion, authorize notice advising these class members of the action and allowing them to intervene on an individual basis to protect their interests. *See* Rule 23(d); *Payne v. Travenol Labs Inc.*, 673 F.2d 798, 812 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982); *Elliott v. Weinberger*, 564 F.2d 1219, 1228-1229 (9th Cir. 1977).[32] As these two provisions do not give class members the opportunity to "opt-out," notice is not required. *Walsh v. Great Atlantic & Pacific Tea Co.*, 726 F.2d 956, 963 n.3 (3d Cir. 1983); *Plummer v. Chemical Bank*, 668 F.2d 654, 658 (2d Cir. 1982).

It is important to note that when Congress authorized the 1966 amendments to Rule 23 it did so with the understanding, as stated in the Advisory Committee Note, that "the present provisions of 29 U.S.C. § 216(b) are not intended to be affected by" the amendments. *Schmidt*, 527 F.2d at 536 n.4; *Paddison*

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31. In addition to the findings which must be made under Rule 23(a), *see* note 30, *supra*, to maintain a class action under Rule 23(b)(3) the Rule requires the district court to make findings that common questions of law or fact predominate over questions affecting only individual class members and that the class action is superior to other available methods for the fair and efficient adjudication of the controversy.

32. Rule 23(c)(2) likewise provides for notice to Rule 23(b)(3) class members that they may intervene individually.

v. Fidelity Bank, 60 F.R.D. 695, 700 (E.D.Pa. 1973).[33] Given this history, the courts have consistently rejected the contention that the notice provisions of Rule 23 can be borrowed or modified in cases governed by § 16(b). *See, e.g., Dolan*, 725 F.2d at 1268; *McGinley v. Burroughs Corp.*, 407 F. Supp. 903, 911 (E.D. Pa. 1975); *Roshto v. Chrysler Corp.*, 67 F.R.D. 28, 29-30 (E.D. La. 1975); *Paddison*, 60 F.R.D. at 700. It is manifest that had Congress perceived need for any type of court notice, as authorized by Rule 23 or otherwise, in cases governed by § 16(b) it would have amended § 16(b) as well as the rule. *See Lehman v. Nakshian*, 453 U.S. 156, 162 (1981) ("Congress . . . [has] demonstrated that it knew how to provide a statutory right to a trial jury when it wished to do so elsewhere . . ."). Its failure to amend the statute is telling, *see id.* at 167-168, especially against the background of the complete absence of any judicially-created court notice in § 16(b) cases on which Congress might otherwise have relied. There is simply no evidence that there has ever been any congressional perception of the desirability of court facilitated notice in § 16(b) cases.[34]

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33. The 1966 Advisory Committee specifically considered but rejected an opt-in procedure for Rule 23. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356, 397-398 (1967).

34. The court of appeals took a misguided approach by resolving the issue in terms of whether there is affirmative evidence that Congress in amending Rule 23 intended to "bar" court notice for § 16(b). 862 F.2d at 446. The relevant inquiry is whether, in the absence of express congressional authorization for notice, there is anything in the legislative history from which a congressionally perceived need for notice can be inferred. Congress' deliberate decision to leave § 16(b) unaffected by the amendments to Rule 23, which, *inter alia*, authorized notice to intervene, strongly suggests that this inference cannot fairly be drawn.

D. The ADEA.

There is nothing in the legislative history of the ADEA which supports the concept of court facilitated notice to potential litigants. To the contrary, it is clear that Congress made a deliberate decision to incorporate in the ADEA the enforcement procedures of the FLSA "to the greatest extent possible". *Lorillard v. Pons*, 434 U.S. 575, 582 (1978) (quoting the remarks of Sen. Javits).[35] Thus, at the time Congress incorporated § 16(b)'s opt-in requirement into the ADEA, it was aware, or can certainly be presumed to have been aware:[36]

> (1) that court facilitated notice of the certification of a class action to class members was authorized only by Rule 23 as amended one year earlier, which amendments at the same time eliminated the opt-in (spurious) form of class action;
>
> (2) that § 16(b) provided an opt-in form of joinder which was deliberately left unaffected by the amendments to Rule 23; and
>
> (3) that there was no history of judicial involvement in notice in § 16(b) cases.

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35. "The enforcement techniques provided by . . . [the ADEA] are directly analogous to those available under the Fair Labor Standards Act; in fact . . . [the ADEA] incorporates by reference, to *the greatest extent possible* the provisions of the Fair Labor Standards Act . . . ." 113 Cong. Rec. 31254 (1967) (statement of Sen. Javits) (emphasis added).

36. It is well settled that Congress is presumed to be knowledgeable about the state of the law pertinent to the legislation it enacts. *Goodyear Atomic Corp. v. Miller*, 486 U.S. ____, 100 L.Ed.2d 158, 171 (1988).

Had Congress intended to make a change from prior § 16(b) practice as drastic as court facilitated notice to potential claimants — because of some special aspect of age discrimination — it would have done so expressly.[37]. It is impossible to find in the legislative history *any* intent, let alone a clear intent, on the part of Congress to have authorized court facilitated notice to potential plaintiffs in ADEA cases.

III.

COURT FACILITATED NOTICE CANNOT BE JUSTIFIED ON THE BASIS THAT THE ADEA IS A "REMEDIAL" STATUTE.

The courts which have facilitated notice have almost invariably claimed support for their actions by noting that the

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37. It is also clear that Congress viewed age discrimination in employment as resulting from a misperception about older workers' abilities, in contrast to race discrimination, which was viewed as resulting "from feelings about people entirely unrelated to their ability to do the job." W. Wirtz, *The Older American Worker, Age Discrimination in Employment*, U.S. Dept. of Labor, Report to the Congress on Age Discrimination Under Section 715 of the Civil Rights Act of 1964 (1965) at 2. *See also Employment Problems of Older Workers: Hearings before the Select Subcommittee on Labor of the Committee on Education and Labor, on H. Rep. 10634 and Similar Bills*, 89th Cong., 1st Sess. (1965) at 20, 26; 113 Cong. Rec. 34742 (1967). It is fair to conclude that Congress viewed age discrimination in employment generally as a "labor relations problem" rather than a "civil rights" problem. Rule 23 had been amended in large part to facilitate class action treatment of "civil rights" cases. *Kincade v. General Tire and Rubber Co.*, 635 F.2d 501, 506 n.6 (5th Cir. 1981); *Sperry Rand Corp. v. Larson*, 554 F.2d 868, 875 (8th Cir. 1977), *quoting* 7a, Wright & Miller, *Federal Practice and Procedure*, § 1775 at 24 (1972). Thus, in enacting the ADEA, Congress, which had amended Rule 23 only one year earlier, may not have been concerned that it was excluding age discrimination cases from class action treatment, especially as it was providing for broad enforcement by the government in contrast to the existing enforcement provisions of Title VII. *See* note 14, *supra*.

ADEA and the FLSA are "remedial" statutes. This rationale is flawed as a matter of statutory interpretation. Courts cannot, under the guise of statutory interpretation, grant to themselves a license to legislate where Congress — as the objective evidence here demonstrates — has chosen not to legislate. The rationale is also unsound as a matter of policy because there is no basis for its underlying assumption that absent court notice, the enforcement scheme of the ADEA cannot be fully realized.

Through a brief *per curiam* decision, *Braunstein v. Eastern Photographic Labs, Inc.*, 600 F.2d (2d Cir. 1978), *cert. denied*, 441 U.S. 944 (1979), the Second Circuit became the first appellate court to approve court facilitated notice under § 16(b). The court began and ended its "remedial statute" analysis by noting no more than that the FLSA "should be given a liberal construction" to comport with "the broad remedial purpose of the Act . . . ." *Id.* at 336.[38] Attempting to justify court notice on the basis of this reasoning is incompatible with the teaching of this Court in *Northwest Airlines*, discussed, *supra*, at 15, that "[t]he comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent *not* to authorize additional remedies." 451 U.S. at 93-94 (emphasis added). Moreover, simply as a matter of statutory interpretation, the *Braunstein* approach completely distorts the proper application of the "canon" of the "liberal" or "broad" construction of "remedial statutes." This canon, when used properly, aids in the interpretation of the *actual language employed* by Congress. It should not be used to write into a statute provisions which Congress has not enacted. *See, e.g., Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985); *City of Philadelphia v. Stepan Chem. Co.*, 544 F.

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38. The "discussion" of the remedial statute rationale in the court of appeals below was no more extensive or illuminating. 862 F.2d at 447.

Supp. 1135, 1149 (E.D. Pa. 1982); 3 *Sutherland Statutory Construction* § 60.01 at 55 (4th ed. 1986). As courts have long recognized specifically with regard to the FLSA:

> The Act is to be accorded a liberal construction. But the function of judicial interpretation of a statute is to bring out and give effect to that which is already in it, latent or otherwise. It is not to add new provisions, substantive or otherwise, which the legislative tribunal in the exercise of its permitted choice omitted or withheld.

Marshall v. Western Union Tel. Co., 621 F.2d 1246, 1255 (3d Cir. 1980), *quoting E.C. Schroeder Co. v. Clifton*, 153 F.2d 385, 390 (10th Cir.), *cert. denied*, 328 U.S. 858 (1946).[39]

The court of appeals below stated that, absent notice, the opt-in procedure is "seriously undermined." 862 F.2d at 446. If meant to refer to "court notice,"[40] this statement ignores the facts of this case and other cases with significant numbers of opt-ins.

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39. The district court below, in applying the "remedial statute" canon of construction, erroneously relied on cases such as *Holliday v. Ketchum, MacLeod & Grove, Inc.*, 584 F.2d 1221, 1229-1230 (3d Cir. 1978). See 118 F.R.D. at 403. *Holliday* stands for the proposition that courts should not superimpose restrictions on rights granted by a remedial statute when those restrictions have not been expressly sanctioned by Congress. Manifestly, this principle does not empower a court to create remedies which Congress has not elected to adopt.

40. If the statement is meant to refer to notice in general, it is insignificant. Plaintiffs are free to communicate to potential opt-ins, and, as demonstrated in the discussion below, have consistently been successful in this regard. Moreover, attorneys searching for clients are free to advertise, even by direct mail solicitation, as long as the communications are not misleading. *See Shapero v. Kentucky Bar Assn.*, 486 U.S. ___, 100 L.Ed.2d 475 (1988). *See* note 41, *infra* and the accompanying text.

obtained without any court involvement.[41] In the present case plaintiffs' counsel acknowledge having solicited more than 400 prospective plaintiffs and have filed opt-in consents of more than 400 persons from a universe of perhaps 700 potential claimants. This massive joinder has occurred, without court involvement, as a result of the efforts of plaintiffs and their counsel both prior to and after the commencement of litigation.

The district court below provided yet another rationale for using the "remedial statute" argument to write into § 16(b) a provision for court authorization to facilitate notice:

> If courts refrain from facilitating notice to existing class members, the enforcement of ADEA's remedies for violations which victimize a group of people will be limited only to those victims who are already known to their "champions," . . . or who are fortunate enough to hear and heed "the vagaries of rumor and gossip," . . . or who are courageous enough to recognize the wrong done them and act on their own.

118 F.R.D. at 403. This appeal to sympathy is misguided. First, the history of joinder in this case, as in other cases, belies any need for judicial assistance to those private litigants and counsel

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41. *See, e.g.*, [illegible] *v. European American Bank*, [illegible] (S.D.N.Y. [illegible]) (ADEA action with [illegible] consents filed prior to court approved notice); [illegible] (S.D.N.Y. [illegible]), *cert. denied*, [illegible] (ADEA action with "over 300" opt-in consents filed with no court authorized notice); [illegible] *v. United States*, [illegible] (ADEA action, [illegible] consents filed with no court authorized notice); [illegible] *v. Metropolitan* [illegible] (ADEA action, [illegible] consents filed, no court authorized notice issued).

who wish to serve as "champions" for others. *See* note 41, *supra*, and the accompanying text. Second, it is not the function of the judiciary to assist those not before the court who are not, as the district court put it, "courageous enough to recognize the wrong done them[42] and sue on their own."[43] Congress has commanded the posting of notice to advise employees of their rights. *See* the discussion, *supra*, at 16. In addition, it has assigned responsibility and power to the agencies authorized under the ADEA and the FLSA to enforce those statutes on behalf of all employees, including those who may not be "courageous." *See* notes 15-16, *supra*, and the accompanying text. "[A] vague sympathy for particular litigants" should not be allowed to override the enforcement mechanisms enacted by Congress. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984). Moreover, during the nearly quarter century of the operation of the congressionally sanctioned enforcement mechanism for the ADEA, there has been no showing that those enforcement procedures require the addition of court facilitated notice to permit full realization of the objectives of the statute.[44]

In the final analysis, the canon of statutory construction that a "remedial statute" should be liberally or broadly construed does not permit courts to ignore the reality of the legislative process. *See* R. Posner, *Statutory Interpretation—In the Classroom and*

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42. *Assuming* a wrong was done them!

43. To accept the district's court's reasoning would, in Judge Wyzanski's words, place "more emphasis than has ever been expressly contemplated upon the use of courts as social agencies to set aright whatever is out of joint." *Cherner v. Transitron Elec. Corp.*, 201 F. Supp. 934, 937 (D. Mass. 1962).

44. In this regard, it should be noted that even when the government elects not to act, a single plaintiff is entitled to seek injunctive relief to eradicate discriminatory practices and policies of employers. *See, e.g., Criswell v. Western Airlines, Inc.*, 709 F.2d 544, 558 (9th Cir. 1984), *aff'd.*, 472 U.S. 400 (1985).

in the Courtroom, 50 U. Chi. L. Rev. 800, 808-09 (1983).[45] Here, the legislative process has been ignored, if not abused, by those courts which have used this canon to infer from § 16(b) congressional authorization to facilitate notice to potential plaintiffs when the statutory structure and relevant legislative history are so strongly to the contrary.

IV.

COURT FACILITATED NOTICE IS NOT JUSTIFIED BY ANY LEGITIMATE CASE MANAGEMENT OR REGULATORY CONCERNS.

A. Court Facilitated Notice Would Greatly Exacerbate Case Management Concerns In ADEA Litigation.

An action which could result in the joinder of hundreds of additional plaintiffs in an ADEA suit would appear to create, rather than obviate, significant case management concerns. But the court below has justified its facilitation of notice here on the proposition that judicial economy is *served* by such facilitation: "Filling [the] class with all its possible members" can "aid courts in collapsing a potentially high number of ADEA suits into one case." *Sperling*, 118 F.R.D. at 400, 403. The Third Circuit shared this view. 862 F.2d at 447. This perception, however, is illogical, is debunked by the existence of alternative procedures which achieve judicial economy while avoiding court involvement in the claim generation process, and is particularly unwarranted in age discrimination cases of the type presented here.

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45. "By making statutory interpretation seem mechanical rather than creative, the canons conceal, often from the reader of the judicial opinion and sometimes from the writer, the extent to which the judge is making new law in the guise of interpreting a statute or a constitutional provision." R. Posner, *supra*, 50 U. Chi. L. Rev. at 816-817.

Whether court facilitated notice will in fact aid in "collapsing a potentially high number of separate ADEA suits into one case," *id.* at 403, is at best conjectural.[46] But it is certain that such notice will *inevitably increase the number of plaintiffs* — sometimes geometrically,[47] and that the overwhelming majority of those plaintiffs would not have claimed discrimination at all were it not for their being solicited. Notice, thus, while not necessarily inducing consolidation, does generate numerous new claimants. Likely, also, the claims are not substantively strong, for opt-ins responding to such solicitations are reacting, not to strongly held beliefs — which would have led them to initiate administrative or judicial proceedings — but rather in response to an invitation to join an action at no cost and little inconvenience to themselves.

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46. Indeed, in this case the district court's hypothesis is disproved by the fact that, despite solicitation by the plaintiff group, only one individual chose to opt-in from his own suit while eight individuals opted-out and initiated or joined separate actions. *See* the Addendum hereto at A4-A5.

47. The tortured history of the *Lusardi* case, now pending in the District of New Jersey, proves the point. In *Lusardi v. Xerox*, 118 F.R.D. 351, 353 n. 2 (D.N.J. 1988), four persons brought an ADEA action against Xerox. In an amended complaint nine additional named plaintiffs were added. *Id.* at 353 n. 4. Thereafter, the district court "conditionally certified" a class and ordered Xerox to provide the identities of all potential class members for notice to potential opt-ins. An additional 1,312 plaintiffs opted-in in response to the court ordered notice. 118 F.R.D. at 354. The parties conducted sample discovery, on a substantial scale, of 51 claimants' cases over a 20 month period, *id.* Xerox moved to decertify the class. The district court, acknowledging the variety of defenses to the individual claims of the opt-ins, granted the motion and the class was decertified. 118 F.R.D. at 380. The Third Circuit, considering its second appeal on the case, granted a limited writ of mandamus, and remanded the case to the district court for further consideration. *Lusardi v. Xerox*, 855 F.2d 1062 (3rd Cir. 1988). The district court, on reconsideration, reaffirmed its decision to decertify the conditional class, and revoked and vacated the § 16(b) consents of the 1312 opt-ins. The matter is now proceeding toward trial on behalf of the 13 named plaintiffs.

Moreover, experience does not support the court's fear of a "high number" of separate suits in the absence of notice. In any event, "collapsing" separate suits into one action does little to advance the efficient adjudication of those claims when the price being paid is joinder with those claims of hundreds, or perhaps, thousands of claims that, absent notice, may well never have been brought.[48]

Age discrimination cases arising out of reductions in force and the like often contain claims and defenses which by their nature defy "class" treatment[49] and require individualized consideration by the court. This instant case is illustrative. During the liability phase(s) of this case, proofs will have to be presented with respect to each of the individuals claiming discrimination.[50] "At trial,

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48. The suggestion in the court of appeals opinion that facilitation of notice "will allow the court to set cut-off dates for receipt of consents," 862 F.2d at 447, is equally illogical. Closing the class in such a fashion will not obviate case management concerns but will simply serve to enhance the number of separate suits, for such closure does not constitute the running of a limitations period. Every suit filed within applicable limitations periods must be adjudicated by the courts, whether with other "similarly situated" claims, or otherwise.

49. None of the safeguards surrounding the Rule 23 class certification process are in place here. *See* notes 30 and 31, *supra*. Indeed, even a determination as to whether those being noticed to opt-in are "similarly situated" to the named plaintiffs is typically not made until after the completion of the opt-in process. *See, e.g., Allen v. Marshall Field and Co.*, 93 F.R.D. 438, 445 (N.D. Ill. 1982) (Notice to all potential claimants authorized "regardless of whether [the court] may later find it necessary to bar some of them from joining in [the] action."). This in itself can result in substantial case management difficulties. *See, e.g. Lusardi*, 118 F.R.D. at 358-63.

50. A number of plaintiffs were terminated as a result of decisions by managers or supervisors who were themselves then terminated and who are now co-plaintiffs. Conflict problems have never yet been addressed by the court and would only be exacerbated by a judicially-facilitated solicitation of additional claimants.

each individual plaintiff must bear his or her burden of proof as to each element of an ADEA claim." *Sperling*, 118 F.R.D. at 407, *citing, Berndt v. Kaiser Alum. & Chem. Sales, Inc.*, 789 F.2d 253, 256-57 (3d Cir. 1986). *See also Lusardi*, 118 F.R.D. at 370-76. Individualized defenses may be offered and the motives of several score of decision-makers will have to be examined. *Lusardi*, 118 F.R.D. at 363-70. No matter the case management steps the court may take, discovery and trial will be particularly protracted and exceedingly expensive.

Approximately 1,200 employees were terminated or demoted in the reduction in force. The retrenchment came after an intensive six-month cost reduction study of virtually the entire Roche organization — a study conducted by Roche personnel themselves. Hundreds of employees participated in the study in various ways. Based on the study's recommendations as to those job functions and positions to be eliminated or consolidated, individual managers and supervisors determined the identities of the employees to be terminated or demoted. Almost 100 employees made personnel decisions on terminations and demotions; and employees of all age levels, at all salary levels, and in all job functions from throughout the various divisions of the company were affected."[51] It is beyond cavil that the age discrimination claims of 400 diverse plaintiffs from among that heterogeneous group are not appropriate for "class" type adjudication.

Courts possess means much more effective than judicially facilitated notice to address "multiplicity of suits" and other case management problems. Consolidation of actions is authorized by Rule 42, Fed. R. Civ. P.; venue of suits may be transferred in the interest of justice, 28 U.S.C. § 1404; and when

51. *See generally*, affidavit of Thomas P. MacMahon (J.A. 3d Cir. Vol. I at 125a-127a), and joint affidavit of H. Robert Koch and Robert M. Baron setting forth history of cost reduction study (J.A. 3d Cir. Vol. at 2).

multidistrict litigation arises, such actions may be transferred upon the order of the Judicial Panel on Multidistrict Litigation, *see* 28 U.S.C. § 1407, to any district for coordinated or consolidated pretrial proceedings. Judicious utilization of collateral estoppel may avoid duplicative litigation. These and other case management procedures thus permit judicious consolidation and consideration of multiple claims without concomitant, judicially generated proliferation of the number of claimants. Court facilitated notice is thus the most *inefficient* device for addressing any concerns associated with a "multiplicity of suits."

Moreover, Congress has specifically provided mechanisms for alleviation of case management concerns in § 16(b) opt-in suits. Congress has conferred on the EEOC the power to sue on behalf of all employees adversely affected by age discrimination, 29 U.S.C. § 626(c), and has clearly indicated the preeminent position of the EEOC in the total enforcement scheme. Indeed, an individual's right to bring a private action terminates upon the commencement of a government suit on his or her behalf. 29 U.S.C. § 626(c). This carefully constructed congressional scheme stands in stark contrast to the dubious assumption relied on by the courts below that court generated notice facilitating private party suits will decrease, rather than substantially increase, the number of cases and claims that will require management and adjudication.

B. The Collective Action Provision of § 16(b) Does Not Create Any Special Regulatory Concerns Justifying Court Facilitated Notice.

The court of appeals below, 862 F.2d at 846, also cited with approval the rationale for court facilitated notice set forth in *Woods v. New York Life Ins. Co.*, 686 F.2d 578 (7th Cir. 1980). Judge Posner, the author of the *Woods* opinion, focused on what he perceived to be regulatory concerns, *id.* at 580, which he

believed justified the court's involvement in notice to potential opt-ins."[52]

Woods proposed that because "section 16(b), unlike Rule 20 [the permissive joinder rule], authorizes a representative action, . . . this authorization surely must carry with it a right in the representative plaintiff to notify the people he would like to represent that he has brought a suit . . . ." *Id.* at 580. This right, according to *Woods*, is then said to give the district court the power to (1) place "appropriate conditions" on the representative plaintiff's exercise of that right, (2) "protect" plaintiff's counsel against charges of ethical impropriety, and (3) direct the disclosure of the names and addresses of potential opt-ins. *Id.*

The analysis in *Woods* is faulty on several levels:

First, a plaintiff's right to notify potential opt-ins does not derive from § 16(b)'s "representative" action provision. Rather, it is a right guaranteed by the First Amendment, whether it be a § 16(b) action, one governed by Rule 20, or otherwise.[53] Is *Woods really* suggesting that, in a case not governed by § 16(b),

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52. *Woods* also held that these regulatory concerns did not empower the district court "to issue a judicial invitation to join a law suit" by placing the court's "imprimatur" on the notice. *Id.* at 581-82; *cf., Sperling*, 862 F.2d at 447. (The notice authorized by the district court below states that it is court authorized but that the court takes no position on the merits, 118 F.R.D. at 416.) Although notice with the court's imprimatur is particularly objectionable, distinctions in the form of the notice do not explain or justify the basis of judicial authority to approve or otherwise facilitate notice.

53. Moreover, characterizing § 16(b) as providing a "representative" action in the sense meant by *Woods* ignores the legislative history of the statute. *See* the discussion, *supra*, at 13-18. Thus § 16(b) is now clearly an intervention device. It allows intervention similar to that allowed by the "timely" intervention provision of Fed. R. Civ. P. 24.

a plaintiff does not have an absolute right to notify potential plaintiffs who may qualify for joinder under Rule 20? This implication in *Woods* to the contrary notwithstanding, § 16(b) and Rule 20 cannot be distinguished on the basis of a plaintiff's right to communicate.

Second, the *Woods* court offered no rationale for its conclusion that a right to communicate, by virtue of its existence, logically empowers the court to "place appropriate conditions" on the exercise of that right.

Third, there is no longer any legitimate concern about the courts' need to "protect" plaintiff's counsel from charges of unethical behavior in the "stirring up of litigation," 686 F.2d at 580 (if, indeed, the courts ever had either an obligation or the authority to "protect" counsel in this way). This Court's decision in *Shapero v. Kentucky Bar Assoc.*, 486 U.S. ____, 100 L. Ed. 2d at 475, discussed, *infra* at 42, makes clear that counsel's rights in this regard are protected by the First Amendment.

Fourth, *Woods* nowhere explains why a court, because it is authorized to impose "conditions" on plaintiff's right to communicate, is *therefore* authorized to order the disclosure of names and addresses for the purpose of soliciting opt-ins. An order directing *defendant* to disclose names and addresses for purposes of solicitation constitutes facilitating solicitation—it cannot be justified as imposing a "condition" on a right belonging to *plaintiff*. *Woods'* analysis in this regard ("It also follows . . .") is an obvious *non sequitur*.

In sum, the *Woods* rationale for court regulated notice does not articulate a logical basis for the supposed source of that authority.[54] It also fails to adequately explain how the supposed

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54. *Woods* also relied in part, without explanation, on Fed. R. Civ. P.
(Cont'd)

authority to regulate the content of notice encompasses a power to facilitate the transmittal of notice.

C. No Ethical Considerations Exist in the Client Solicitation Process Which Can Be Used to Justify Judicial Facilitation of Notice.

This Court's opinion in *Shapero* was issued while this case was pending in the court of appeals. The Third Circuit thereafter determined that, in light of *Shapero*, the ethical considerations barring solicitation by lawyers, relied on in cases such as *McKenna,*" to prohibit notice in cases governed by § 16(b), were no longer persuasive. 862 F.2d at 447. But the Third Circuit below, as had the court in *Woods*, 686 F.2d at 580, went too far.

In *Shapero* this Court considered a state bar advisory

(Cont'd)
83. 686 F.2d at 580. That rule provides that "in all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with" the Federal Rules. It would seem beyond question that courts cannot, without violating the principles set forth in *Northwest Airlines, discussed supra*, at 13-18, supplement statutory enforcement schemes enacted by Congress under the guise of "regulat[ing] their practice." *See also Pan American World Airways*, 523 F.2d at 1079-80 (rejecting Rule 83 as source of justification for notice).

55. The court in *McKenna*, 747 F.2d at 1212-17, after concluding that the district court lacked authority to direct notice to potential opt-ins in § 16(b) suits, analyzed the issue of an attorney's right to solicit opt-ins under the commercial speech test enunciated in *Central Hudson Gas & Electric Corp. v. Public Serv. Comm.*, 447 U.S. 557, 566 (1980). It found that the important governmental interests justifying the proscription of in-person solicitation for gain, *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978), were closely approximated by the authorization for direct mail solicitation sought by counsel, so that ethical constraints barred his sending joinder notice to prospective plaintiffs.

commission's prohibition of a letter which counsel proposed to send potential clients facing foreclosure suits. The Court held that the First Amendment protects nondeceptive direct mail solicitation of potential clients even when such solicitations are targeted to specific legal problems. Framing the issue in terms of whether the mode of communication posed a serious danger for overreaching and undue influence on the recipients being targeted, the majority relied on the ability of state and professional organizations to engage in effective oversight and regulation to reject a categorical prohibition of this form of attorney advertising. *Id.* at ____, 100 L.Ed.2d at 486.

The Third Circuit below first concluded without further analysis that the ethical constraints relied on in *McKenna* to bar § 16(b) solicitation of opt-ins, *see* note 55, *supra*, do not withstand the *Shapero* decision. 862 F.2d at 447. It continued:

> It follows that communications which the district court finds to be truthful and nondeceptive, designed to inform putative class members of the pendency of the suit and their opportunity to consent to join, cannot be barred under the guise of being unprofessio[illegible] or unethical.

Id. The court then proceeded to add, as a policy justifying court-authorization of notice, that this authority "allows the court to regulate the content of the notice that is sent out." *Id.*

Implicit in the Third Circuit's rationale is that: (a) a targeted solicitation to a prospective opt-in to sign a consent form, without attorney consultation, and thereby become a plaintiff in an ongoing case is identical, in ethical terms, to a targeted letter-advertisement soliciting a proposed client to consult with counsel on a specific problem, (b) pre-transmittal judicial approval is beneficial to defendants and is thus justified in a case governed by § 16(b)

and (c) the district court may justify judicial facilitation of such a solicitation on a finding that counsels' invitation to join the suit is truthful and nondeceptive. *Id.* In thus reasoning, the Third Circuit inappropriately extended *Shapero* far beyond its intended reach and used it affirmatively in a manner not warranted by the holding of that case.

Whether written solicitations to opt-in to a § 16(b) action are protected under *Shapero* is irrelevant to the issue of judicial power before this Court.[56] But it should be noted that *Shapero* and its antecedents deal with issues of the regulation of attorney advertising — not the enhancement of advertising opportunities through a process of judicial review and compelled discovery of the identities of its targets.

The court below, as had the court in *Woods*, 686 F.2d at 580, indicated that court involvement serves the interests of *defendants* by ensuring that notice sent by plaintiffs' counsel will be appropriately phrased and distributed. 862 F.2d at 447. Particularly in light of *Shapero*, however, this view is unrealistic. Counsel, as happened here, can avoid prior court scrutiny of notice by undertaking a variety of solicitation efforts before commencement of suit. Plaintiffs themselves can solicit prospects

56. A § 16(b) solicitation which in every respect mirrored *Shapero's* — even suggesting attorney consultation rather than the direct filing of a consent, as in this case — simply would not justify court authorization for, or facilitation of, its transmittal. Nothing in *Shapero* suggests that advocates who advertise, whether to obtain clients faced with foreclosure or clients who might wish to assert an age claim, should in any manner be assisted *by the court* in advancing their personal pecuniary interest.

Indeed, assuming the Third Circuit's view to be correct, *i.e.*, that the type of letter in *Shapero* and the solicitation proposed here are legally indistinguishable, the absence of any ethical concerns makes judicial involvement by the district court in the solicitation process even less appropriate.

for joinder. Likely, the only reason plaintiffs' counsel would consider submitting notice to the court for screening would be after other avenues of advertising and solicitation were exhausted (as was the case here) and in exchange for a court order directing defendant to provide the names and addresses of potential class opt-ins. Under this scenario, the court would be facilitating counsel's solicitation efforts under the guise of protecting the defendant, an illogical approach and a "protection" defendants would gladly eschew.

Moreover, the judicial expedient of "regulat[ing] the content of the notice that is sent out," *id.* at 447, cannot justify the court's facilitation of that notice.[57] Attorneys desirous of advertising, or soliciting § 16(b) opt-ins, cannot bootstrap any concern they have over whether their solicitation is a "truthful and nondeceptive" document into justification for active court involvement in a solicitation process on their behalf. Nor can the court, out of any desire to alleviate counsels' concerns over the content of a proposed solicitation, assume the power to both review it and authorize its transmittal.

The court below also justified presolicitation judicial review and approval by analogizing to the dispute occasioned by the "unfortunate language used in the March 7th [R.A.D.A.R.] letter" which was sent out seeking opt-ins here. 862 F.2d at 447.

The court did not explain how solicitations such as the R.A.D.A.R. letter, sent out two months before suit was filed, and signed by a group of prospective plaintiffs, would be impacted by a policy regulating the content of court facilitated notice. Even the court in *Woods*, which, without analysis, considered inappropriate any type of unilateral communication by plaintiffs

57. *See also*, note 52, *supra*, at 40.

(as well as their counsel) inviting joinder after suit was filed, did not suggest any impropriety in the invitations plaintiff had sent out prior to filing. Woods, 686 F.2d at 580.

Roche has readily agreed throughout this suit that affected employees have the unfettered right, protected by the First Amendment, to communicate among themselves and with others, including the right to solicit joinder in their suit. The proper role of the judiciary here is not one of prior restraint of employee communications. It is, rather, to review, upon motion by a party to the suit, the propriety of the consents which have been filed as a result of the solicitation process. It is then that the court has an adequate factual record and the unquestioned judicial power upon which to act. Rule 11, Fed. R. Civ. P., which, inter alia, "requires pleadings to be based on a good-faith belief, formed after reasonable inquiry, that they are 'well grounded in fact'," *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, ___, 98 L. Ed. 2d 306, 322 (1987), provides the standard for that review.[illegible]

The desire of the district court to review the content of proposed solicitations out of a misplaced concern for defendants or to avoid subsequent controversy cannot be considered an "ascertainable source of judicial authority," *Pan American World Airways*, 523 F.2d at 1077, which would justify an order to authorize and facilitate those solicitations.

[illegible] It is, indeed, the very process which Roche has sought to utilize in the courts below in light of its views with respect to the consents resulting from the misleading and incomplete [illegible] letter. See Sperling, [illegible] at [illegible]; Sperling, [illegible] (declining appellate review over Roche's motion to void consents without prejudice).

CONCLUSION

The judgment of the court of appeals on the question certified to it pursuant to 28 U.S.C. § 1292(b) should be reversed.

Respectfully submitted,

[illegible]
One Gateway Center
Newark, New Jersey 07102-5311
[illegible]
Counsel of Record

[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
A Professional Corporation
One Gateway Center
Newark, New Jersey 07102-5311
Counsel for Petitioners

Of Counsel

[illegible]
General Counsel
[illegible]
Assistant General Counsel
Hoffmann-La Roche Inc.
[illegible]
Nutley, New Jersey 07110
[illegible]

[illegible], 1989

ADDENDUM — RELEVANT FEDERAL STATUTES

1. Section 16(b) of the Fair Labor Standards Act (FLSA), codified at 29 U.S.C § 216(b), provides as follows:

> § 216. Penalties; civil and criminal liability; injunction proceedings terminating right of action; waiver of claims; actions by Secretary of Labor; limitation of actions; savings provision
>
> * * *
>
> (b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in

Addendum

writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

2. Section 7(b) of the Age Discrimination in Employment Act (ADEA), codified at 29 U.S.C. § 626(b), provides as follows:

> § 626. Recordkeeping, investigation, and enforcement
>
> * * *
>
> (b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated

Addendum

> damages; judicial relief; conciliation, conference, and persuasion
>
> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

RELATED PROCEEDINGS: AGE DISCRIMINATION SUITS RESULTING FROM FEBRUARY 4, 1985 REDUCTION IN FORCE

Case	Court	Docket #	Status
Bishop v. Hoffmann-La Roche Inc. (nineteen plaintiffs four opt-outs from *Sperling)*	New Jersey Superior Court; Essex County	L-21399-87	pending
Fisher v. Hoffmann-La Roche Inc.	U.S. District Court for the District of New Jersey	87-442	pending
Hudak v. Hoffmann-La Roche Inc. (Opt-out from *Sperling)*	New Jersey Superior Court; Essex County	L-24141-85	pending
Humiec v. Hoffmann-La Roche Inc. (Opt-out from *Sperling)*	New Jersey Superior Court; Essex County	L-087631-85	pending
Joyce v. Hoffmann-La Roche Inc.	U.S. District Court for District of New Jersey	87-2723	pending
Joyce v. Hoffmann-La Roche Inc.	New Jersey Superior Court; Camden County	L-23129-87	placed on inactive list

Addendum

Case	Court	Docket #	Status
Kaufmann v. Hoffmann-La Roche Inc.	U.S. District Court for District of New Jersey	86-1769	pending
Mitrovic v. Hoffmann-La Roche Inc.	New Jersey Superior Court; Essex County	L-096812-85	Age discrimination Count dismissed
Nolan & McConnville v. Hoffmann-La Roche Inc. (two plaintiff's, one opt-out from *Sperling)*	New Jersey Superior Court; Essex County	L-062265-86	dismissed
Spagnuolo v. Hoffmann-La Roche Inc. (opt-in to *Sperling)*	United States District Court Newark	87-330	dismissed
Umbach v. Hoffmann-La Roche Inc. (opt-out from *Sperling)*	United States District Court Newark	87-2742	pending
Umbach v. Hoffmann-La Roche Inc. (opt-out from *Sperling)*	New Jersey Superior Court Camden County	L-23137-87	placed on inactive list
White v. Hoffmann-La Roche Inc.	United States District Court Newark	87-437	pending

RESPONDENT'S

BRIEF

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No. 88-1203

In The

Supreme Court of the United States

October Term, 1989

HOFFMANN-LA ROCHE INC.,

Petitioner,

vs.

RICHARD SPERLING, FREDERICK HEMSLEY AND JOSEPH ZELAUSKAS, Individually, and on behalf of all other persons similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS

SUMMARY OF ARGUMENT

The issue at bar is whether, in an appropriate case, a federal district court has the requisite judicial power, under 29 U.S.C. § 216 or otherwise, to facilitate the efforts of the named plaintiffs

in a class action under ADEA to locate and then notify other potential party plaintiffs similarly situated of the right to opt-in to said class action.

At bar, the Respondents, the Named Plaintiffs, submit that the district court properly ordered Petitioner to disclose to them the names and addresses of those former employees affected by its reduction in force so that a court-authorized notice of pendency of the action could be sent to such persons notifying them of their right to opt-in.

There are abundant sources of a district court's power. Even though Section 216(b) itself fairly contemplates some reasonable level of communication between actual and potential opt-ins, that communication often cannot take place without some notice mechanism by which the parties can first locate one another. Certain procedural characteristics of the ADEA, including the ADCAA amendments, confirm the desirability of informing grievants of their private law suit opportunities. Several provisions of the Federal Rules themselves also provide a basis for the court's power. Rule 23(d)(2) reflects the court's power to direct notice for actions other than those certified under 23(b)(3) and for reasons other than due process. Rules 20 and 24 implicate the court's general power to regulate the joinder of additional parties. Rule 30 and the related discovery rules confirm the court's power to order discovery of the names and addresses. Rule 83 reflects the broad inherent case management powers of the court.

The 1947 amendments to Section 216(b), while curtailing a type of representative action in which the named plaintiff is not himself a member of the covered class, left intact the type of employee-prosecuted collective action at bar. The legislative history surrounding the enactment of the ADEA reveals an intent to invest the district court with broad power to promote ADEA actions. The class action device may be a potent weapon in the arsenal

of aggrieved employees. It should not be nullified simply because Section 216(b) does not explicitly authorize class notice.

There are a host of policy-based reasons for favoring court-facilitated notice. The ADEA is remedial legislation which should be liberally construed. Court-facilitated notice promotes judicial economy by preventing a multiplicity of individual suits. Court notice also provides the district court with an opportunity to regulate the form and content of the notice, thereby insuring a neutral presentation and distribution to all affected persons. Without court notice, solicitation will take place anyway, but in an unregulated fashion.

One of the principal concerns of the three federal circuits which have disapproved of notice is the reluctance to encourage barratry. That concern has been obviated by this Court's decision in *Shapero v. Kentucky Bar Association*, 486 U.S. ____, 108 S. Ct. 1916 (1988).

ARGUMENT

I.

A DISTRICT COURT HAS THE POWER TO AUTHORIZE OR OTHERWISE FACILITATE A CLASS NOTICE OF PENDENCY IN AN APPROPRIATE CASE.

A. The Judicial Power Argued for Herein Is a Limited One.

The issue raised on this appeal is whether a federal district court hearing a case under the ADEA has the requisite judicial power, under 29 U.S.C. § 216(b) ("Section 216(b))" or otherwise, which power it may or may not choose to exercise in an appropriate case, to authorize or otherwise facilitate some form of communication from a group of named plaintiffs to a group of

potential party plaintiffs apprising the latter of a pending class action brought under the ADEA and of their right to opt-in to it.

That judicial authority may be exercised over a spectrum of possible options: On one end, the court may authorize the named plaintiffs or their counsel to distribute a court-approved notice of pendency to all employees coming within the named plaintiffs' class definition of similarly situated employees. On the other end, the court may merely direct the employer, without more, to furnish the named plaintiffs' counsel with the names and last known addresses of all persons meeting such definition. The intermediate positions reflect varying degrees of court involvement in the manner and content of the various communications themselves.

At the outset, it is important to fix the boundaries on how the authority of the district court is to be exercised. First, at the least, the Respondents have asked that the Petitioner be directed to provide to them or to their counsel a list of the names and last known residence addresses of each potential opt-in person described in the lawsuit who has been determined as being similarly situated. To this extent, the named Respondents essentially seek a discovery order. The dissemination of the ensuing communications from the Respondents or their counsel to the listed persons can be conducted in a fashion unsupervised by the court. Implicit, however, in the order directing the disclosure of the list of names is permission of the court for the Respondents or their counsel to communicate with such listed persons for the specific purpose of soliciting their joinder to the lawsuit. The actual content of the initial communication to such persons, assuming it is to take a written form, need not be subject to prior court review or approval.

Second, beyond directing that the list of names and addresses be furnished to the Respondents or to their counsel, the district court may, but is not required to, by Section 216(b), involve itself

in reviewing the actual manner and content of the initial written communications to such opt-ins.[1] Whether and to what extent the district court elects to involve itself in this process is a matter left to its discretion. To be sure, there are compelling and practical reasons for the court to play a role in supervising the content and distribution of the notice in most or all cases: But these reasons, do not, in and of themselves, provide the sources for the court's power to do so. The Respondents herein do not require the district court to review the contents of the notice and its manner of distribution; they are amenable, because of the additional benefits flowing therefrom, to the district court's involvement. (*See* Point IV.)

Third, the proposed communication to potential class members, whether emanating from the court in the form of a formal notice, or from plaintiffs' counsel in the form of a letter or memorandum not on court letterhead, is not, on its face, despite Petitioner's mischaracterization of same, a "solicitation" or "invitation", let alone a "conscription", to join the lawsuit. The notice or letter, especially if its provenance is from the court, consists of a neutrally worded document that merely *informs* recipients of the pendency of the action and of their right to opt in thereto. In the same document, the legal consequences of joinder are normally explained. Detailed procedures for filing an opt-in consent form are described and a cut-off date for making this election to join is set forth.

Fourth, to what extent the notice should explicitly state, on its face, that it has been authorized for distribution by the district court, is also a matter within the discretion of the district court. Whether or not the content of the notice is approved in advance by the court, it remains subject to post-distribution review. By

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1. That, too, involves an issue as to the district's court's power which apparently Petitioner does not herein dispute.

approving the notice before it is sent out, the court insures that it reflects a balanced presentation and does not unnecessarily take on the appearance of being a solicitation to join a lawsuit. (*See* Point IV.)

Fifth, for purposes of this appeal only, as the issue is not before this Court, the Respondents assume, but do not concede, that the class certification provisions of Rule 23(a) to (c) are inapplicable to an ADEA class action and that Section 216(b) provides the exclusive procedure for class action formation.

B. The Judicial Power Argued for Herein Should Be Exercised Only in an Appropriate Case.

Petitioner has argued that a district court lacks the power to send out a notice, regardless of the circumstances, so that no form of judicial facilitation of the distribution of a notice of pendency can ever be authorized. Petitioner further argues, in effect, that the side benefits of notice, no matter how compelling, can never warrant authorization. As we show herein, Petitioner's position on this appeal is plain error.

The Respondents assert that the district court retains the *power* to authorize distribution of some form of permissive notice to potential class members in *an appropriate case*. They do not urge that facilitation of notice to class members is mandatory under the ADEA in every case whenever classwide allegations are asserted in the complaint. The several sources which give a district court power to authorize notice are discussed in Point II. The legislative history of Section 216(b) and its incorporation into the ADEA is discussed in Point III. The question of what is *an appropriate case* for favoring facilitation of notice is discussed in Point IV along with the several policy considerations which overwhelmingly favor such exercise of judicial power.

II.

THERE ARE SEVERAL SOURCES OF THE COURT'S POWER, BASED ON STATUTE AND COURT RULE, TO FACILITATE NOTICE TO THE CLASS OF SIMILARLY SITUATED PERSONS.

A federal district court's power to direct an employer to furnish the names and last known addresses of all potential opt-ins to a class action and/or to authorize the sending out of notices to such potential opt-ins derives from a host of sources: The nature of the statutory scheme itself in 29 U.S.C. § 216, the additional procedures and remedies available under the ADEA, the Age Discrimination Claims Assistance Act of 1988, several enumerated provisions of the Federal Rules of Civil Procedure, and the inherent and general power of a federal court to regulate those aspects of cases brought before it relative to joinder of parties, intervention of parties, class-wide discovery and communications from counsel to class action members. We review each of these various sources of power.

A. The Statutory Sources.

(1) *The Statutory Scheme of Section 216(b).* Section 626(b) of the ADEA incorporates by reference certain of the powers, remedies and procedures of 29 U.S.C. § 216(b). This latter section, in turn, explicitly authorizes a representative party to bring an action on behalf of all other persons similarly situated. Although Section 216(b) is silent on the question of whether the representative has the right to notify such other persons of the pendency of his action, the Respondents submit that the specific authorization therein is not merely duplicative of a district court's power under Federal Rules 20 or 24. In particular, Section 216(b) allows a collective action to be commenced without the actual initial joinder of all other persons as party plaintiffs by authorizing

an action to be brought by one or more representative plaintiffs and by allowing any person similarly situated to the named plaintiffs to join that action after it has been commenced by the simple process of filing an opt-in consent form.[2] This procedure in the statute, going beyond Rule 20 or 24, must be construed to promote the formation of a collective action in some measurable fashion; otherwise, there would be no purpose to such language.

Implicit in the right of a representative party to bring a collective action, and in the reciprocal right of an opt-in party to join such action, is the ability of both sides to freely communicate with each other. A named plaintiff cannot begin to inform persons of their right to join his suit where, as here, there are large numbers involved and he does not know their identities. By the same token, it is unlikely that such persons will know instinctively to go to a certain courthouse to discover the existence of a class action lawsuit which they are eligible to join. Some form of notice from the named plaintiff or the court to each potential opt-in is a logical (and perhaps the only) way to initiate this line of communication.

Although Section 216(b) is silent on the right of either side to communicate with one another, that hardly means that no communication was contemplated to occur. *Dolan v. Project Construction Corp.*, 725 F.2d 1263 at 1267-1268 (10th Cir. 1984). On the contrary Congress could not have enacted Section 216(b),

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2. As a companion to Section 216(b), Section 256 of the FLSA sets forth an explicit procedure whereby any opt-in plaintiff who has filed a consent form is considered to have commenced his own individual action. This Section of the FLSA was not, however, explicitly incorporated into the ADEA, suggesting that the statute of limitations for all opt-ins does not depend on the date each consent is filed, but is satisfied on a class-wide basis when the action is first commenced. The omission of Congress to incorporate Section 256 provides another basis to believe Congress intended a more liberal treatment of the class action device of Section 216(b) when applied to actions under the ADEA.

intending a collective action to be brought by a group of employees, without expecting some reasonable level of communication among class members, including some means for the named plaintiff to initiate that process of communication. To say that Section 216(b) does not bar communications between an actual plaintiff and potential opt-ins may be a cold judicial blessing; Section 216(b) must be fairly construed to encourage some exchange of information among class members. If the employer is not ordered by the court to supply their names and addresses, the congressional purpose in permitting a class action becomes substantially thwarted.

Petitioner cannot minimize the need for court facilitation by pointing to the partial success of the unsupervised solicitation campaign conducted at bar by the Respondents. Petitioner suggests that because the Respondents were able to secure joinder of over 400 opt-in consents, "from a universe of perhaps 700", court facilitation is not needed in this case; Petitioner then leaps to the conclusion that court facilitation may not be needed in other cases (Brief, p. 33). Its observations do not prove the point: Despite substantial efforts, over forty (40%) percent of the universe of potential claimants did *not* opt-in to this case. Moreover, Congress could not have intended the degree of success in class action formation to depend not upon the merits of the case, but upon such fortuities as how well funded or well connected the named plaintiffs are.

As we discuss in Point III, the 1947 amendments to Section 216(b) did not reflect a change in this congressional intent. While the amendments were designed to limit certain types of employee group actions, they did not purport to repeal Section 216(b); they merely prevent a type of collective action wherein the representative party is not himself a victim of the practice sued upon. Section 216(b), as amended, still provides a basis for the formation of employee class actions beyond that available under the joinder

provisions of the Federal Rules and that plain fact cannot be ignored. Thus, *NLRB v. Plasterers Local Union No. 79,* 404 U.S. 116 (1971), cited by Petitioner (Brief, pp. 23-3), is indeed "highly instructive", for this Court stated therein that it would refuse "to construe legislation aimed to protect a certain class in a fashion that will run counter to the goals Congress clearly intended." 404 U.S. at 130. If repealing all collective actions had been intended, all references in Section 216(b) to collective actions would have been deleted in their entirety.

In sum, the right of the Respondents to notify all similarly situated persons of the pendency of a law suit is a reasonable, if not necessary, corollary of the right to communicate with all potential opt-ins. As the Seventh Circuit stated in *Woods v. New York Life,* 686 F.2d 578 (7th Cir. 1982), the authorization itself in Section 216(b) to bring a collective action:

> ". . .surely must carry with it a right in the representative plaintiff to notify the people he would like to represent that he has brought a suit and a power in the district court to place appropriate conditions on the exercise of that right." 678 F.2d at 580.

A similar conclusion was reached by the Third Circuit below which held that the continued existence of a class action procedure itself, after the 1947 amendments, reconfirmed the right to send out a notice of pendency. The court stated:

> "The continued authorization for bringing collective or quasi-class actions under the procedural provisions of the FLSA demonstrates Congress' lack of hostility to such actions, if nothing more. However, if a plaintiff could not contact and solicit the consents of other 'similarly

> situated' individuals, the congressionally sanctioned form of action would be meaningless." 862 F.2d at 446.

Unless some form of notice is authorized to be sent, the organizational success of a collective action will thrive or die depending upon "the vagaries of rumor and gossip through which certain fortunate grievants might happen to hear of the pending suit." *Lusardi v. Xerox Corp.,* 99 F.R.D. 89 at 93 (D.N.J. 1983). *See also, Sperling v. Hoffmann La Roche,* 119 F.R.D. 392 at 403 (D.N.J. 1988).

(2) *The ADEA and Its Additional Remedial Purposes.* Although the provisions of the ADEA are to be enforced in accordance with certain powers, remedies and procedures provided by Section 216(b) of the FLSA, the ADEA is also a remedial statute which reflects its own set of legislative priorities. When Section 216(b) is applied in an ADEA rather than in a FLSA context, there is an *a fortiori* basis for a liberal interpretation thereof (Point IV). Moreover, certain special characteristics in the ADEA reflect the judicial power to authorize notice.

(a) *The Right to Receive Notice of a Representational Filing.* Unlike the FLSA, the ADEA imposes, as a jurisdictional prerequisite to suit, that each claimant first timely file a charge of discrimination with the EEOC under 29 U.S.C. § 626(d) within 180 or 300 days of the alleged discriminatory activity. It is settled among the circuits that this agency filing requirement will nonetheless be satisfied for all aggrieved persons as long as one individual claimant makes a representational charge by filing, with the EEOC, on behalf of all other persons similarly situated. *Bean v. Crocker National Bank,* 600 F.2d 754, 759-60 (9th Cir. 1979); *Mistretta v. Sandia Corp.,* 639 F.2d 588, 593-4 (10th Cir. 1980); *Kloss v. Carter-Day Co.,* 799 F.2d 397, 400 (8th Cir. 1986); *Lusardi*

v. Lechner, 855 F.2d 1062 at 1078 (3rd Cir. 1988).[3] The concept of a "piggyback" filing is not to be found anywhere in the ADEA. The rationale for this judicially-created remedy stems, quite properly, from the remedial nature of the ADEA.

This Court should not construe Section 216(b) in a manner which will eviscerate that judicially created remedy. Without receiving information from the representative that a representational filing has been made on their behalf, aggrieved individuals may take no steps to bring a private suit, believing, albeit mistakenly, that their rights to sue have lapsed because they have not personally and timely filed with the EEOC. This misinformation can be corrected in a class-wide notice of pendency to such persons.

While a federal court may not have a responsibility to promote the maximum number of potential opt-ins to a class suit, the ADEA fairly mandates that those with viable private rights of action should at least be given fair notice of that fact.

(b) *ADCAA: The Right to Receive Notice of an Expiring Statute of Limitations.* Congress recently addressed itself quite forcefully in favor of promoting the dissemination of information to grievants relative to the viability of their private rights of action. In April 1988, Congress passed the Age Discrimination Claims Assistance Act of 1988, Pub. L. 100-283, 102 Stat. 78, codified at 29 U.S.C. § 626(e) ("ADCAA"). ADCAA extends to September 1989 the statute of limitations in Section 626(e) of the ADEA for commencement of a private suit for any person who timely filed an EEOC charge after December 31, 1983, but who thereafter was not timely notified by the EEOC of the imminent expiration of the statute of limitations and of his right to bring

3. The first three decisions cited come, ironically, from the same three circuits which have opposed judicial facilitation of class notice.

a private action. ADCAA reflects a clear and unalloyed expression of congressional intent that discrimination grievants be timely informed of their legal options with respect to commencing private actions under the ADEA.

The message reflected in ADCAA is inescapable: If it is appropriate to warn certain aggrieved individuals that the statute of limitations for commencement of a private suit under ADEA is about to expire, it is equally appropriate to inform other aggrieved persons that there exists a pending class action under ADEA in which their individual claims can be presented.[4]

(c) *The Right to Receive the Information Indirectly from the EEOC.* The list of names and last known addresses of all potential opt-ins, as sought herein by the Respondents, is usually discoverable, often without issuance of subpoena, by the EEOC during the course of its investigation, whether or not it announces plans to commence a class action suit against the employer. EEOC Compliance Manual §§ 24.1, 26.1 to 26.3; 29 C.F.R. § 1601.16(a)(1) to (3).

Given the ease with which the EEOC can acquire the list of names, there is no reason for giving private litigants any lesser rights of access to this information: The ADEA itself contemplates dual enforcement by either the EEOC or by private litigants and, in fact, the information may be discoverable from the EEOC through a request by counsel for the named plaintiffs under the Freedom of Information Act, 5 U.S.C.A. § 522(a). The fact that the list of names is discoverable from the EEOC anyway undercuts

4. The class action may be the individual's *only* means of redress if a court determines that his right to bring suit is available only through his opting in to a class action brought by the same named plaintiff who filed the EEOC representational charge upon which he can claim a piggyback right. In such a case, notice to the individual is even more critical.

Petitioner's claim for refusing to provide this information directly.

B. The Federal Rules.

(1) *Rules 20 - 24: The Court's Inherent Power to Regulate Joinder and Intervention.* Under the permissive joinder and intervention procedures of Rules 20 and 24, respectively, a district court has the inherent power to regulate the manner in which non-parties join an action. There is no doubt that if the district court below had specifically ordered the joinder of any additional parties herein under the provisions of Rule 20, or had granted intervention of additional parties under Rule 24, it would have been obliged to implement that order by directing that notice of the suit be given to such persons. If the court had ordered joinder under Rule 20 or 24, its inherent power to authorize notice to the persons to be joined would not have been questioned.[5]

There is no reason to treat these provisions in a crimped fashion merely because the joinder involves a large number of persons. Rule 20 has, in fact, been liberally construed in the interest of promoting convenience and judicial economy without regard to numbers of persons. This Court has stated ". . .the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." *UMW v. Gibbs,* 383 U.S. 715 at 724 (1966). *See also, United States v. Mississippi,* 380 U.S. 128, 142-143 (1965). Section 216(b) reflects, at the least, these same impulses. Accordingly, if the district court herein has the requisite power under Rule 20 or 24 to authorize the sending out of notice, and the exercise of that power should generally be encouraged to promote joinder, the court should have at least

5. *See* Advisory Note to Rule 19(c) expressly confirming a district court's power to send out a notice of pendency to absentee parties who have not been joined.

the same degree of power and encouragement to use that power to promote joinder under Section 216(b).

(2) *Rules 30, et seq.: The Court's Inherent Power to Order and Regulate Discovery.* A district court has the power to order and to regulate the process of discovery. Clearly, the names and last known addresses of all class members is information discoverable for use in preparation of trial. Respondents could also use the information to contact potential witnesses or to acquire other information to aid in the development of their class case. *Dolan v. Project Construction Corp.*, 725 F.2d 1263 at 1267 (fn. 4) (10th Cir. 1984). This information, should not, *ipso facto,* become nondiscoverable merely because it may also be used, at least initially, for another purpose, *i.e.*. advising the persons from whom the discovery is sought of the pendency of this action and of their rights to join the action. *See United States v. Cook,* 795 F.2d 987 (Fed. Cir. 1986).

It would be unrealistic to expect any non opt-in person, once contacted for the purpose of providing information about his co-workers, not to raise an inquiry on his own about joining the class case. At that point, counsel's response to such an unsolicited inquiry would have the same practical effect as a notice of pendency. Under the notion of preventing attorney solicitation of such persons, this Court should be reluctant to prevent the named plaintiffs from pursuing legitimate merits discovery to which they would otherwise be entitled. *Cf., Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 643 (1985). Moreover, given the broad scope of permissible communications allowed by this Court, judicial efforts to monitor the initial communications, to make sure that the subject of joinder was first raised by the person contacted, rather than by plaintiffs' counsel, are likely to be

unavailing.[6] The ability of counsel to secure witness cooperation or confidence could also be impaired. The disinclination of a district court to scrutinize what would otherwise be permissible discovery, to impose impractical and burdensome restraints on free speech, and/or to become immersed in subtle questions as to who first raised the subject of joinder, thus provides further reason for allowing the requested discovery without restriction as to its use.

(3) *Rule 83: The Court's Inherent Power to Regulate Other Matters Relative to Case Management and Administration.* Under Rule 83, a federal district court retains broad power to regulate and manage any other matters bearing upon the handling of any case before it which is not specifically provided for in the other Federal Rules. As discussed in Point IV, judicial economy and the avoidance of a multiplicity of suits are two cogent case management reasons for court-facilitated notice.

Rule 83, when considered in conjunction with the court's other specific and enumerated powers to regulate the joinder of parties, the intervention of parties, discovery and class-wide communications, fairly encompasses the power to facilitate the distribution of a class notice. *See Gulf Oil v. Bernard*, 452 U.S. 89, 99 (fn. 10) (1981). The procedure adopted by the district court below should be analyzed under a four-part test: (1) Does it conflict with an Act of Congress? (2) does it conflict with the Federal Rules? (3) is it constitutionally infirm? and (4) is the subject matter within the power of the court? *Frazier v. Heebe*, 107 S. Ct. 2607, 2616 (1987) (Rehnquist, C.J., dissenting), citing *Colgrove v. Battin*, 413 U.S. 149, 150-160, 162-164 (1973); *Miner v. Atlas*, 363 U.S.

6. After *Shapero v. Kentucky Bar Assn.*, 108 S. Ct. 1916 (1988), discussed in Point IV(D), attorneys will, in certain instances, enjoy more freedom to initiate the subject of solicitation of joinder. The once-perceived need to police these communications from counsel may be obviated.

641, 651-652 (1960); *Story v. Livingston*, 13 Pet. 359, 368, 10 L. Ed. 200 (1839).

Petitioner does not argue that facilitation of notice implicates constitutional concerns, conflicts with any Act of Congress or that the *subject matter* is not within the power of the district court to regulate. (Petitioner, itself, invoked the court's jurisdiction to review the propriety of the consents heretofore filed.) Nor does Section 216(b) conflict with Federal Rule 23. The Advisory Committee Notes to Rule 23 state: "The present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended." Rule 23 cannot, at once, both preclude notice under Section 216(b) and yet not "affect" Section 216(b). Moreover, Rule 23(d)(2) provides notice to class members to advise them of their right to "come into the action". This phrase contemplates some affirmative act by the class members. Therefore, court facilitation of notice under Rule 83 cannot conflict with Rule 23, which itself allows for a similar procedure.

Petitioner may carp that there is nothing in Rule 83 which explicitly endows the district court with the power to authorize notice. Of course, there is also nothing in Rule 11 which explicitly gives a court "unquestioned judicial power" to "review, upon motion by a party to the suit, the propriety of the consents which have been filed as a result of the solicitation process." (Petitioner's Brief, p. 46). Yet, it would seem that if a district court has the plenary authority to invalidate consents, as Petitioner urges, the district court at least ought to have the reciprocal power to marshall together all those consents so that its review of them can indeed be made on an "adequate factual record." *Id.*

(4) *Rule 23: The Court's Inherent Power to Regulate Communications Among Class Members; Concerns Other Than Due Process.* Petitioner has argued that Rule 23 is wholly inapplicable to class actions under the ADEA because such actions

must be exclusively governed by Section 216(b). This misconceives the broad scope of Rule 23. Whether or not Rule 23 deals only with a type of class action not available in an ADEA action, it reflects the inherent power of the court, nonetheless, to order the distribution of a class notice when appropriate in any class action, regardless of whether the class has been "certified". *Gulf Oil*, 452 U.S. at 99-101; *see also*, Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 299 at 328 (1973).

Under *Gulf Oil*, a district court has the inherent power, without regard to certification under Rule 23(c), to regulate and supervise the content of the initial communications from the named plaintiffs and their counsel to other class members prior to their joinder.[7] To the extent that the court has the general power to regulate or review initial communications from counsel to class members, it should, perforce, have the general power to approve the sending out of an initial communication from counsel.

Petitioner has also argued that any analogy to the notice provisions of Rule 23(c) is misplaced because no due process concerns mandate notice. This argument is flawed. A judicial concern for due process is not itself the *source* of judicial power to send out notice; it is, at most, only a *reason* for exercising that power. *See Partlow v. Jewish Orphan's Home of So. Cal.*, 645 F.2d 757 (9th Cir. 1981). Moreover, a judicial concern for due process remains only one reason for a court's decision to

7. "Because of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." 452 U.S. at 99-100. Nothing in *Gulf Oil* suggests that the application of Rule 23 is necessarily limited to class actions of the type to be "certified" under Rule 23(c). In *Gulf Oil*, this Court dealt with pre-certification communications from plaintiffs' counsel to putative class members. The Court had no way of knowing whether Rule 23(c) certification would ever apply.

exercise its inherent power to send out notice.

Although Rule 23(c)(2) specifically authorizes a court to direct notice to class members in cases certified under Rule 23(b)(3), a district court appears to have this power anyway because of the binding adjudicatory effect of a judgment thereunder. Power to send out notice in a class action thus exists even without the specific language of Rule 23(c)(2). In actions certified under Rules 23(b)(1) and 23(b)(2), where class members have no opportunity to opt-out of the action and notice to them is not essential for due process purposes, the district court may still provide for the sending out of an *optional* notice, including notice to allow persons to intervene. *See* 7B Wright, Miller & Kane, *Federal Practice and Procedure*, § 1786 at 195-97 (2d Ed. 1986). Thus, valid concerns, other than due process, can sufficiently motivate the court to authorize notice. In these cases, the authority of the court to send out a notice to class members derives from the court's own inherent case management powers.

Even due process itself is not a distinct reason for allowing notice. Petitioner's argument, that notice is only required for due process reasons, overlooks the *stare decisis* effect of a class action adjudication. Even without *res judicata* or collateral estoppel, a class action judgment, although binding only upon the persons who have actually opted-in, will effectively dissuade, if not bar, non opt-ins from pursuing further action on their own. *See* Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 46 (1967).[8]

8. An adjudication of class claims may not bind these persons on *res judicata* principles, but it could nonetheless affect the viability of their claims in the broadest sense. "The trial court has an obligation to those not before it to ensure that they are apprised of proceedings that may finally affect them; and pursuant to this responsibility, the court is vested with broad administrative as well as adjudicative power. *In re Gypsum Antitrust Cases*, 565 F.2d 1123 (9th Cir. 1977).

If other reasons can be identified which warrant the court's authorization of a notice of pendency, the court should exercise its inherent power to order class notice to effectuate those reasons. This broad power to send out notice in any appropriate case is clearly reflected in Rule 23(d)(2) wherein a court may, in the exercise of its discretion, authorize the sending out of a notice for the "fair conduct" of the action.

As we discuss in Point IV, there are several judicial concerns at bar relating to the "fair conduct" of an ADEA class action which justify the sending out of class-wide notice. Those concerns relate to avoidance of multiplicity of individual suits, establishing cut-off dates, effective case management and effectuating the broad remedial purposes of the ADEA. There is also a legitimate concern for according evenhanded treatment to uninformed potential class members. Whether or not all or any of these various concerns are as compelling as those relating to due process is not the point; they may be important enough for a district court to exercise its power to order notice.

C. Absence of any Overriding Provisions.

Petitioner has asserted several generalized objections to court-facilitated notice:

(1) *The Court's Maintaining of a Posture of Neutrality.* Petitioner has expressed a concern that court-facilitated notice, because it benefits the employee class to the detriment of the employer, somehow results in a loss of neutrality. The concern is overstated.

Even if a district court owes no duty to protect or educate any uninformed person who is sleeping on his rights, the failure to facilitate notice to such persons adversely impacts on those grievants who have already opted-in: Such grievants lose the

perceived benefits of the pooling of the financial and informational resources available from other opt-ins. As we discuss below, Petitioner's real objection is not to court-facilitated notice as such, but to the resource-pooling effects of the class action device which may substantially enhance the litigation capabilities of those persons already *sub judice*.

While a decision to facilitate notice to absent class members does benefit the class members who have already brought the suit, each opt-in must still prove his or her respective case. Thus, the resource-pooling benefit being conferred by the district court's action herein does not tip the scales in a way that impermissibly puts the court on the employees' side. Moreover, a decision *not* to facilitate notice necessarily provides an equal but opposite benefit to the employer.

Even if notice temporarily does palpably tip the scales in the employees' favor in this regard, the result seems congressionally warranted in light of the remedial purposes of the ADEA. As the Seventh Circuit stated in *Woods*:

> "We think it sufficiently unlikely that Congress, having created a procedure for representative actions, would have wanted to prevent the class representatives from notifying other members of the class that they had a champion . . . ." 686 F.2d at 580-581.

(2) *The Appearance of Judicial Sponsorship.* Petitioner has expressed a concern that the district court's facilitation of notice predetermines the outcome of a decision to opt-in because it suggests judicial approval or sponsorship. Petitioner's concern in this regard raises a non-issue which can easily be resolved. As the Third Circuit below stated:

> "We assume that the district courts will exercise caution that notices approved by the courts will not give the erroneous impression that maintenance of the action has a judicial imprimatur of approval." 862 F.2d 439 at 447.

Any suggestion that the district court, in authorizing a notice of pendency, somehow endorses either the lawsuit or a decision to opt-in thereto can easily be rectified by appropriate disclaimer language therein (as was followed by the District Court below), or as was followed in *Woods*, 686 F.2d at 582, by disallowing the notice to be sent out on court letterhead or signed by a judicial officer.

(3) *The Court's Restraint in Adding Remedies to an Already "Complete" Statutory Scheme.* Petitioner has also expressed a concern that court facilitation of notice creates new remedies beyond those in the "carefully crafted" enforcement schemes of the FLSA and the ADEA (Brief, pp. 14- 18). Petitioner cites *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 at 93-94 (1983), for the proposition that additional remedies should not be authorized because of the "comprehensive" character of the remedial scheme already fashioned by Congress. *Id.* Petitioner's argument not only begs the question as to the supposed comprehensiveness of the ADEA remedial scheme, but confuses substantive remedies with their procedural implementation. Court facilitation of notice eases the formation of employee class actions; it does not, however, create either new rights or new remedies to enforce those rights.[9] Nor can Section

9. "Procedure is an elusive word . . . [It] denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the court is to administer the machinery as distinguished from its product." Moore and Bendix, *Congress, Evidence and Rulemaking*, 84 Yale L.J. 9 at p. 12 (fn. 17) (1974). *See also, Sibbach v. Wilson*, 312 U.S. 1, 14 (1940).

216(b), in broadly authorizing the use of a class action device, but without providing mechanical details as to implementation, be considered a comprehensive enforcement provision. Its terse enabling language leaves scores of unanswered questions; it plainly invites, rather than rejects, courts to flesh out the details.

For all the foregoing reasons, it is clear that there are abundant sources of judicial power, besides the ADEA and Section 216(b), for facilitating notice to absent class members. To be sure, these two statutes provide the starting point. They reflect a basic congressional recognition of the benefits of a collective action by allowing such an action to proceed through the device of a named representative rather than through the more cumbersome procedure of permissive mass joinder. Moreover, even without this clear congressional mandate, a district court's power to facilitate notice in an appropriate case can equally be inferred from the Federal Rules and from the district court's own inherent power to manage and regulate cases before it.

III.

THE LEGISLATIVE HISTORY OF THE ADEA AND THE FLSA SUPPORT THE AUTHORITY OF THE COURT TO FACILITATE NOTICE OF AN ACTION.

The legislative history surrounding the enactment of the ADEA and the FLSA provides compelling evidence that Congress sought to favor class actions as an enforcement device. Thus, a district court's decision to facilitate notice to potential plaintiffs is consistent with the FLSA, as amended by the Portal-to-Portal Act, the ADEA and the Federal Rules.

A. The ADEA.

This Court has already noted that the ADEA itself provides

broad remedies to effectuate its purpose in eliminating arbitrary discrimination in the work place based on age. *Lorillard v. Pons,* 434 U.S. 575, 581 and 582 (1978). In addition to conferring upon the district court the power to grant *legal* relief, the ADEA has also conferred the broadest possible jurisdiction upon the courts to grant "such . . . *equitable* relief as may be appropriate to effectuate the purposes of [the Act]." 29 U.S.C. § 626(b). Even without this explicit language, the ADEA is clearly a broad remedial statute which should be read liberally. *See, e.g., Allen v. State Board of Elections,* 393 U.S. 544, 554-57 (1969). (*See* Point IV.)

In fashioning the enforcement mechanisms for the ADEA, Congress provided that the rights created thereby were to be "enforced in accordance with the powers, remedies and procedures" of certain selected sections of the FLSA. 29 U.S.C. § 626(b). The decision to use the FLSA enforcement is revealing: The original bill submitted by the Johnson Administration provided for enforcement patterned after the National Labor Relations Act, with a bureaucracy to be created within the Department of Labor. S. 830, 90th Cong. 1st Sess. (1967). Under that bill, the Secretary of Labor would have had the power to issue cease and desist orders and to take such affirmative action, to carry out the purposes of the statute. S. 830, Section 7(b)(1). For several reasons, this format was rejected by Congress. The choice of the FLSA, rather than the NLRB Model, was apparently motivated by a desire to avoid the establishment of a new bureaucracy and to utilize instead a structure already in place for enforcing the FLSA and the Equal Pay Act.[10]

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10. *See Lorillard,* 434 U.S. at 578. *See also,* Hearings on S. 830 and S. 788 before the Subcommittee on Labor and Public Welfare, United States Senate, 90th Cong., 1st Session (1967) (statement of Sen. Javits at p. 24); *see also, id.* at 96 (statement of Andrew J. Biemeller, Legislative Director, AFL-CIO); *id.* at 221-222 (statement of A.T.A.A.); ADEA, Hearings on H.R. 3768 and

(Cont'd)

No intent can be inferred from this legislative history to restrict the power of the district courts to afford equitable relief. On the contrary, the choice of the FLSA rather than the NLRA model reflects a preference for judicial as opposed to agency enforcement. Senator Javits, one of the the sponsors of the ADEA, criticizing the record of agency delay stated:

> "Such delay is always unfortunate, but it is particularly so in the case of older citizens to whom, by definition, relatively few productive years are left. By utilizing the courts rather than the bureaucracy within the Labor Department as the forum to hear cases arising under the law, these delays may be largely avoided." 113 Cong. Rec. 7076 (1967).

He then summarized the ADEA's enforcement procedures as "direct action in the district court by the Secretary of Labor or by an employee for appropriate relief." *Id.*

Even without this legislative mandate, this Court has traditionally construed a district court's equitable powers in a broad fashion. This Court has stated: "Unless otherwise provided by statute, all the inherent equitable powers of the district court are available for the proper and complete exercise of that jurisdiction." *Porter v. Warner Co.,* 328 U.S. 395, 398 (1945). Under this test, the only question is whether there is anything in the ADEA barring court-facilitated notice. Congress not only did not, by silence, leave the equitable powers of the district court undisturbed from what existed in the FLSA, it expressly conferred

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H.R. 4221 at p. 413, before General Subcommittee on Labor of the Committee on Education and Labor, House of Representatives, 89th Cong. (1967) at p. 413 (statement of Kenneth A. Mackenzie, Legislative Representative AFL-CIO).

broader authority to grant such relief as may be appropriate to effectuate the purposes of that Act. Thus, the court's jurisdiction and power contained in the ADEA is more expansive than that conferred by the language of the FLSA. *Cf.*, 29 U.S.C. § 217.

This Court has also stated that "when Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." *Mitchell v. DeMario Jewelry,* 361 U.S. 288 (1959) The broad equitable jurisdiction conferred upon the court by the ADEA mandates that Section 216(b) not be narrowly construed as including only the powers expressly conferred in the language of the statute. *Id.* at 290-292.

This Court has also historically favored complete joinder of parties:

> "By this means the court is enabled to make a complete decree between the parties, to prevent future litigation, by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before, or to *others* who are interested in the subject matter." (Emphasis added.) *Minnesota v. Northern Securities Co.*, 184 U.S. 199 (1902).

Petitioner argues that Congress perceived age discrimination in employment as a "labor relations problem" rather than as a "civil rights problem", and thus was not concerned that in selecting the FLSA model, it might be barring age discrimination cases from class action treatment. In fact, the sponsors of the ADEA explicitly described it as filling a gap in the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, 113 Cong. Rec. 31254 (statement by Senator Javits). That statute directed the Secretary of Labor to

make a study of the age discrimination problem and report back to Congress. ADEA Senate Hearings, *supra,* at p. 24; 113 Cong. Rec. 7076. Moreover, when Congress selectively incorporated various of the FLSA enforcement provisions, it may be presumed to have been familiar with the Conference Report to the Portal-to-Portal Act which, in discussing the tolling of the statute of limitations, contemplated that collective actions and class actions under the FLSA could be brought under *either* Rule 216(b) or Rule 23. *See* 93 Cong. Rec. 4386-7.

Petitioner also argues that because the 1966 amendments to Rule 23 provided for notice to potential claimants that a class action had been certified, and because "Congress deliberately left Section 216(b) unaffected" by these amendments," that Congress in effect disapproved of court-facilitated notice. Petitioner's argument is a *non sequitur*. First, even if one were to accept the notion that Congress deliberately left Section 216(b) unaffected by the provisions of Rule 23, it does not follow that because Rule 23 provides for notice to potential class members, Congress believed that such facilitation of notice would be inappropriate for Section 216(b) actions. Indeed, to the extent that Petitioner argues that notice is inappropriate in cases brought under Section 216(b), because there are no due process concerns, its argument proves too much because Rule 23 itself allows the court to facilitate notice where due process concerns are not implicated. (*See* Point II.)

Second, the statement in the notes of the Advisory Committee

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11. Petitioner implies that Rule 23 was in fact a congressional enactment. Rule 23 is a rule prescribed by the Supreme Court pursuant to the power vested in the Court by Congress. Under the statutory scheme, the rules prescribed by the Supreme Court went into effect unless Congress promptly took affirmative action. This procedure made it virtually impossible for Congress to effectively review the provisions of the Rules. *See*, excerpt from Report of Senate Judiciary Committee, No. 1406, 112 Cong. Rec. 17306.

regarding the effect on Rule 216(b) of Rule 23, as amended, was to insulate not derogate Section 216(b). The Rules were promulgated by the Supreme Court, not Congress; the Advisory Committee was well aware that the authority of the Supreme Court to make rules was constricted by 28 U.S.C. § 2072 which provided: "Such rules shall not abridge, enlarge or modify any substantive right. . . ." The Committee was thus reluctant to modify any substantive rights perceived to exist therein. Moreover, given the juxtaposition of the Advisory Note caveat with the discussion of Rule 23(b)(3), it is apparent that the Advisory Committee was loathe to impose new criteria on what constituted "similarly situated" under Section 216(b).

B. FLSA and the Portal-to-Portal Act Amendments Thereto.

(1) *The Fair Labor Standards Act.* The FLSA, originally passed in 1938, provided for two types of collective actions. Pub. L. No. 718, Section 16(b), 52 Stat. 1060, 1069 (1938): (1) An employee could sue on behalf of himself and other similarly situated employees (a "collective" action) or (2) one or more employees could designate an agent or representative to maintain an action on behalf of all employees similarly situated (a "representative action").

Between 1938 and 1947, Section 216(b) was generally interpreted expansively to facilitate collective action. *Shain v. Armour & Co.*, 49 F. Supp. 488, 489-490 (W.D. Ky. 1941); *Culver v. Bell & Loffland*, 146 F.2d. 29 (9th Cir. 1945). "Congress intended to liberalize and relax the procedure for bringing suits to enforce the sanctions of the [FLSA]. The procedure was left to the court's discretion . . . ." *Jumps v. Leverone*, 105 F.2d 876 at 877 (7th Cir. 1945). "Every opportunity . . . should be given employees to come into court and make their complaints known." *Schemph v. Armour & Co.*, 5 F.R.D. 294 at 298 (Minn. 1946). List of potential plaintiffs can be obtained through discovery where

the information is peculiarly within the knowledge of the employer. *Smith v. Stark Trucking*, 53 F. Supp. 826, (N.D. Ohio 1943).

These judicial interpretations of Section 216(b) provided the context when Congress revisited the FLSA in 1947.

(2) Portal-to-Portal Act Amendments. This Act was intended to avoid the imposition upon employers, as a result of certain Supreme Court decisions, of "wholly unexpected liabilities, immense in amount and retroactive in operation." 61 Stat. 87 Sec. 1(a), 29 U.S.C. § 211. Congress was concerned that much litigation had been commenced by labor union activists who had no real personal interest therein and who had "stirred up" litigation for economic or ideological reasons. *See, e.g.*, 93 Cong. Rec. 538, 2182.

The 80th Congress remedied the perceived problem when it surgically excised from Section 216(b) the "representative action." This insured that a lawsuit under the FLSA could only be brought by a party in interest. The Portal-to-Portal Act, however, left the "collective action" untouched, as well as the judicial interpretations of Section 216(b) discussed *supra*.

A review of the legislative history cited in footnote 23 of the Petitioner's Brief reveals the true nature of the congressional concern. The comments of both Senators and industry spokesmen all relate to overzealous union activities. The concern expressed by Senator Donnell related to "outsiders", *i.e.*, the national unions who were perceived as stirring up litigation among employees who perhaps did not themselves feel aggrieved. These unions, of course, did not require the aid of the court to compel an employer to disclose the names and addresses of its employees as such information was already available to them.

These anti-union concerns which led to the Portal-to-Portal

Act amendments do not apply to the issue of court-facilitated notice. Thus, because Congress did not provide an expiicit procedure for notice does not mean that the amendments were intended to prohibit it. In fact, Petitioner's arguments cancel each other out. On one hand, it states that Congress was "acutely aware of the great success of the methods used in many instances by employees to notify fellow workers of their potential claims. . ." (Brief, p. 22). This implies that Congress did not perceive the need for court-facilitated notice. On the other hand, Petitioner states that the proponents of the Portal-to-Portal Act disapproved of such activities (Brief, p. 23). If Congress has indeed disapproved of *all* collective action by employees, it would have repealed all references to collective action in Section 216(b).

IV.

THERE ARE A HOST OF POLICY CONSIDERATIONS WHICH, ON BALANCE, STRONGLY FAVOR COURT FACILITATION OF NOTICE TO ABSENT CLASS MEMBERS.

As previously demonstrated, a district court has the requisite authority, to be exercised in *an appropriate case*, to facilitate notice to absent class members under Section 216(b). Exercise of that power by a federal court is discretionary and not mandated in every case. Once the basic power of a federal district court to facilitate some form of notice is found to exist, policy considerations, whether favoring or disfavoring notice, can and should be factored in — but on a case by case basis.

On this appeal, the Respondents submit that these various policy considerations, taken together, while not decisive on the issue of a district court's power, are so uniformly consistent with a court's exercise of that power, they lend support to the conclusion that there is an adequate basis for that power to be exercised.

A. Giving Effect to the Remedial Purposes of the ADEA.

Courts have regularly held that where a remedial statute is involved, it should be given a liberal construction so as to effectuate the remedial purpose for which it was enacted. *See* 3 Sutherland, *Statutory Construction* § 60.01, *et seq.* (4th Ed. 1986); *Braunstein v. Eastern Photographic Laboratories, Inc.*, 600 F.2d 335 at 336 (2nd Cir. 1978), *cert. denied*, 441 U.S. 944 (1979); *Woods v. New York Life Insurance Co.*, 686 F.3d 578 at 581 (7th Cir. 1982). It cannot be gainsaid that the ADEA is a classic example of remedial legislation expressly intended to benefit a broad class of society's victims. While the "remedial statute" canon of construction does not require that every statutory construction issue arising under ADEA be automatically interpreted so as to favor the older employee as against his employer, it does mean that where there is nothing specific in the ADEA barring a particular construction, there should be a judicial disposition to resolve the issue in a manner favoring the intended employee beneficiary. *Id.* at 60.01.

When Section 216(b) is applied in an ADEA context, the same judicial disposition toward a liberal construction should apply. Court-authorized notice to all similarly situated employees effectuates the remedial purpose of the ADEA for both the actual and potential groups of opt-ins. For those employees who have not opted-in, notice of a suit which they would not otherwise have received is obviously beneficial to them. Similarly, for those employees who have already opted-in, circulation of notice advances their claims as well. This latter group benefits because it results in bringing together a larger and more effective force of litigants aligned against the employer. From this aggregation of victims, a greater pooling of informational and financial resources among age discrimination victims is possible. The court in *Frank v. Capital Cities Communications, Inc.*, 88 F.R.D. 674,

amended on other grounds, 509 F. Supp. 1352 (S.D.N.Y. 1981), stated:

> ". . . the experiences of other employees may well be probative of the existence *vel non* of a discrimination policy, thereby affecting the merits of the plaintiffs' own claims; and the notice machinery contemplated by the ADEA, by reaching out to potential plaintiffs, may further the statute's remedial purpose." 88 F.R.D. at 676.

Petitioner may complain that this pooling of employee resources is precisely the evil to be avoided because it creates the appearance of a court losing its neutrality by helping the employee group become organized. Petitioner's concern misses the point. Although court-facilitated notice may help age discrimination victims become organized in a way they could not do themselves, a number of other judicial procedures, such as discovery, can accomplish, at least in part, the same result.

Petitioner's real objection at bar is with the class action device itself — not to the court's facilitation of notice in aid of organizing a class action. To litigation strategists, the class action device is normally a potent litigation tool.[12] Employment discrimination suits generally do not pit together equally matched litigants; it is the employer who has a greater array of litigation resources. By providing a magnet for individual claims, the class action pares down the employer's natural advantage. To the extent that the class action thereby achieves a realignment in the balance of power, that result should not be unwelcome in light of the

12. *See generally*, Spahn, *Resurrecting the Spurious Class: Opting-In to the ADEA and Equal Pay Act Through the FLSA*, 71 Georgetown L.J. 119 (1982).

remedial purposes of the ADEA.[13]

Petitioner may, on the other hand, contend that the class action device does not always fulfill the remedial purposes of the ADEA since it may not be the most effective means for adjudicating a controversy. Whether or not that is so, the right to designate what litigation procedures to employ in prosecuting claims should remain the employees' prerogative. Unless this Court is prepared to hold that the class action device enables employees to wield too heavy a club in all cases, a district court should not second guess the efficacy of a litigation device which a group of employees have themselves selected.[14]

In the alternative, Petitioner may argue that since the class action device of Section 216(b) lacks some of the rigors of certification found in Rule 23(a) and (b), a district court should not further facilitate access thereto. *McKenna v. Champion Int'l Corp.*, 747 F.2d 1211 at 1213 (8th Cir. 1984). This begs the question before this Court, namely, whether Congress, in designating the procedures of Section 216(b), rather than those of Rule 23, intended to make it easy or harder to bring a collective action under the ADEA. (*See* Point II.) Moreover, the argument ignores the fact that a class action under Section 216(b) has its own set of rigors which must be met. In addition to the requirements that each class member affirmatively opt-in and be

13. If the class action device, as contemplated by Section 216(b), somehow gives an unfair litigation advantage to the employees, that problem is for Congress and not the courts to correct.

14. In addition to promoting the remedial purposes of the ADEA, the class action device and plaintiffs' concomitant request for court-facilitated notice fulfills this Court's recent mandate in *Martin v. Wilks*, 57 L.W. 4616 (June 13, 1989), that the parties to a lawsuit themselves, rather than potentially affected third parties, should bear the burden of joining or bringing in additional parties. (*See* Point IV(E).)

similarly situated, a district court could, in its discretion also engraft some or all of the requirements of Rule 23(a) and (b) on the theory that the case was otherwise not appropriate for court-facilitated notice.

In sum, whether Section 216(b) was intended by Congress to favor or disfavor ADEA class actions, it is clear that Section 216(b) provides a means, if not the only means, of class action formation. It should be given a liberal construction *because* the ADEA is a remedial statute.

B. The Avoidance of Multiplicity of Suits.

There can be little doubt that judicial economy is served when a group of grievants are able to prosecute their various claims against a common employer in a single action. Although court notice will result in more litigants, it does not necessarily produce more litigation. The bulkiness of a class action with 400 opt-ins hardly compares with the veritable chaos of 400 separate individual actions. Even for the employer, one class action should be a welcome trade-off for a tangle of several hundred individual suits.

Rule 23 reflects a judicial preference for the class action device as a means of reducing the multiplicity of suits. An ADEA class action is a type of class action and the same generic reasons of promoting judicial economy which favor certification under Rule 23(c) should apply to a class action under Section 216(b).

The EEAC's Amicus Brief suggests that court-authorized notice may encourage individuals to submit consents when there may be no underlying claims to support them and no effective mechanism for the court to review such claims (Brief, p. 23). The EEAC forgets that the district court retains power to review the validity of the consents under the "similarly situated" standard in Section 216(b) and under various other sources of judicial power

discussed in Point II. In any event, the very requirement in Section 216(b) that each opt-in affirmatively consent to join the action provides a more effective mechanism for judicial review than the passive opt-out provisions of Rule 23(b)(3).

C. The Opportunity for Effective Case Management and Supervision.

The need for the named plaintiffs to apply to the district court for leave to circulate a notice of pendency provides an otherwise unavailable opportunity for the district court, as a condition to granting said application, to review the manner and content of the initial communication from the named plaintiffs, and to thereby impose certain case management controls.[15]

First, the notice of pendency is sent to everyone aggrieved. This eliminates the concern that some aggrieved individuals, by misfortune or happenstance, are not contacted through extra-judicial networking. Second, the process can be implemented in fixed periods of time: Extra-judicial networking is an unreliable and slow process that has no end. When a court-authorized notice is circulated, an opt-in cut-off date can be established which provides that no additional persons may join the class after such date. A cut-off date provides certainty to both sides and allows the litigation to move forward with no lingering concerns about stragglers.

Third, the possibility of misleading or deceptive statements

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15. Petitioner misconceives this point as expressed in *Woods*, 686 F.2d 578 (Brief, p. 41). The Seventh Circuit stated that plaintiffs' request for court facilitation provided an opportunity for regulating the contemplated communications and that such regulation was desirable to all parties. *Woods* does not state that the power to facilitate notice *derives* from the power to regulate notice.

from the named plaintiffs or their counsel is obviated by the district court's prior review and approval of the content of the notice. This insures that a neutral and balanced presentation is made. Moreover, in cases where the employer has already publicly disseminated its own version of the facts, court notice provides an opportunity for creating a responsible dialogue on the issue and a "total mix" of information to the potential opt-ins. *Monroe v. United Airlines*, 90 F.R.D. 638 at 640 (N.D. Ill. 1981), citing *TSC Industries v. Northway, Inc.*, 426 U.S. 438 at 449 (1976).

Fourth, without some form of judicial notice, the formation of a class action will be relegated to relying on extra-judicial networking with all the attendant limitations of a process which is time-consuming and less than thorough. Moreover, because direct attorney solicitation is still somewhat proscribed by ethical considerations, (*see* Point IV(D)), the process of information dissemination to potential opt-ins must normally be entrusted to the named plaintiffs, with the anomalous result that those most knowledgeable about the case, the attorneys, are restricted in what they can say to potential opt-in lest their communications be construed as unethical solicitations.

Fifth, there is a very practical reason for the court to involve itself in the facilitation of class notice: With all of its imperfections, extra-judicial networking may inevitably occur if there is no other practicable way for the named plaintiffs to secure the names and addresses of potential opt-ins. Thus, whether or not a district court elects to facilitate notice, it may find itself being obliged to review an unsupervised solicitation campaign. *See Partlow v. Jewish Orphan's Home of So. Calif.*, 645 F.2d 757 (9th Cir. 1981). In *Dolan*, the Tenth Circuit displayed reluctance to involve the district court in the process of "engrafting certain additional class actions procedures to protect the administration of the case from improper certification and issuance of notice." 725 F.2d at 1268. Such involvement may be, however, unavoidable. The named

plaintiffs and their counsel may merely resort to other non-judicial means to locate absent class members: telephone and mail networking; targeted mailings; chain letters and media advertising. Depending upon the degree of success of such informal means, the employer may then be expected to attack all or part of the communication campaign as being misleading or deceptive. Judicial oversight will still be necessary — prompted by the employer, rather than the named plaintiffs.

Sixth, given that there is no way to prevent persons from networking for the purposes of associating themselves in a class action, and given, further, that there are side benefits to a district court's involvement in the solicitation process, the solicitation process ought to be *facilitated* by the district court which, at the same time, can thereby *regulate* and *supervise* it. These regulatory and supervisory procedures have become fairly established in those courts which allow court-facilitated notice. The concern of the *Dolan* court that this will burden the court with new procedures is simply untrue. *Id.*

There is a seventh and final policy reason normally favoring court-facilitated notice: The haphazard nature of informal networking does not reflect well on the judicial system. It usually means that most persons end up opting-in to a class action because they coincidentally knew somebody or because somebody knew of them. It means that other persons who are not well-connected never receive any opportunity to decide for themselves whether or not to join the suit. This is a slipshod way for our system of jurisprudence to operate: For a discrimination victim, it is particularly unfair to victimize him further by denying him access to basic information about the vindication of his legal rights merely because the named plaintiff could not discover his identity

through the grapevine.[16]

For all of these reasons, some degree of court supervision and involvement in the notice circulation process produces a fair result. It insures uniform treatment for all discrimination victims by giving each grievant at least an equal opportunity to learn the facts and to make his or her own informed decision whether or not to opt-in to a class action suit.

D. The Elimination of any Barratry-Based Concerns.

In *McKenna v. Champion Int'l Corp.*, 747 F.2d 124 (8th Cir. 1984) and in *Kinney Shoe Corp. v. Vorhes,* 564 F.2d 859 (9th Cir. 1977), the circuit courts expressed a reluctance to allow court facilitation of notice because of perceived concerns that to do so would promote barratry or champerty. Indeed, this concern constituted one of the key structural underpinnings for these two decisions. This Court's recent decision in *Shapero v. Kentucky Bar Association,* 486 U.S. ____, 108 S. Ct. 1916 (1988), in allowing non-deceptive targeted direct-mail solicitation by lawyers for pecuniary gain, effectively puts these concerns to rest. In construing *Shapero,* the Third Circuit below noted:

> "It follows that communications which the district court finds to be truthful and nondeceptive, designed to inform putative class members of the pendency of the suit and their opportunity to consent to join, cannot be barred under the guise of being unprofessional or unethical." 862 F.2d at 447.

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16. The conspicuous posting of notice requirement of Section 627 of the ADEA, 29 C.F.R. § 1627.10, hardly provides meaningful notice that an employee's rights have been violated in a particular case.

Although the court's language is limited to nullifying the previous barratry-based objections to court facilitation of notice, as expressed in *Kinney* and *McKenna,* Petitioner confusingly argues that the Third Circuit, somehow "went too far". (Petitioner's Brief, p. 42). We fail to see how. In its decision below, the Third Circuit merely found that since an attorney could, on his own, distribute, without court supervision, a letter inviting persons to consider commencement of a lawsuit, that attorney would not, *a fortiori,* be barred if his letter were sent under court supervision inviting persons to join an already ongoing lawsuit.[17]

We do not understand Petitioner to disagree with this conclusion; on the other hand, Respondents do not contend that *Shapero* means anything more than this.[18] Accordingly, although *Shapero's* holding does not itself compel court authorization of notice, or even implicate the court's power to authorize notice, it does nullify one of the previous objections to court facilitation of notice as expressed in *Kinney* and *McKenna.*

E. Giving Effect to the Burden of Joinder of Additional Parties Imposed on the Plaintiff Class.

In its recent decision in *Martin v. Wilks,* 57 L.W. 4616 (June

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17. The suggestion on page 7 of the Amicus Brief of the EEAC that *Shapero* is limited to mere generalized advertising, rather than specific ongoing litigation, draws a distinction without a difference. Moreover, no such limitation appears in that decision. In any event, to whatever extent *McKenna* and *Kinney* perceived that court facilitation of notice somehow ran afoul of ethical considerations, these concerns cannot remain viable in light of *Shapero.*

18. The Respondents acknowledge that *Shapero* neither expressly nor impliedly holds, and the Third Circuit does not appear to state, that the elimination of any ethical constraints on attorney solicitation somehow provides an *affirmative* basis for justifying the exercise of court power to facilitate notice. The above-quoted words of the Third Circuit — "cannot be barred" — are not equivalent to "must be judicially authorized."

13, 1989), this Court made clear that although it may be "burdensome and ultimately discouraging to civil rights litigation", all affected parties must actually be joined in a lawsuit in order to subject them to the jurisdiction of the court and have them bound by any adjudication. 57 L.W. at 4619. There is no doubt that this burden will usually end up being shouldered by the plaintiff class who seek to alter an employer's practices. The Court stated:

> "As mentioned, plaintiffs who seek the aid of the courts to alter existing employment policies, or the employer who might be subject to conflicting decrees, are best able to bear the burden of designating those who would be adversely affected if plaintiffs prevail; these parties will generally have a better understanding of the scope of likely relief than employees who are not named but might be affected." 57 L.W. at 4619.

Having effectively commanded the named plaintiffs themselves, in a class action context, to make maximum use of the joinder provisions of the Federal Rules to bring in additional parties, rather than rely upon a court-imposed mandatory intervention requirement on non-parties, it would be wholly inconsistent for this Court, in light of *Martin v. Wilks*, to render compliance with that directive more difficult for the named plaintiffs by denying them access to court-facilitated notice — the very procedure they now must utilize to satisfy the joinder burden imposed upon them.

CONCLUSION

The Judgment of the Court of Appeals on the question certified to it pursuant to 28 U.S.C. § 1292(b) should be affirmed.

Respectfully submitted,

BEN H. BECKER
SCHWARTZ, TOBIA & STANZIALE
22 Crestmont Road
Montclair, New Jersey 07042
(201) 746-6000

LEONARD N. FLAMM
HOCKERT & FLAMM
880 Third Avenue
New York, New York 10022
(212) 752-3380
Attorneys for Respondents

Dated: July 6, 1989

REPLY BRIEF

No. 88-1203 (9)

In The

Supreme Court of the United States

October Term, 1988

HOFFMANN-LA ROCHE INC.,

Petitioner,

vs.

RICHARD SPERLING, FREDERICK HEMSLEY AND JOSEPH ZELAUSKAS, Individually, and on behalf of all other persons similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

JOHN A. RIDLEY
One Gateway Center
Newark, New Jersey 07102-5311
(201) 622-2235

Counsel of Record

RICHARD S. ZACKIN
MICHAEL P. HICKEY
MICHAEL G. STEINBERG
CRUMMY, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE
A Professional Corporation
One Gateway Center
Newark, New Jersey 07102-5311
(201) 622-2235

Counsel for Petitioner

Of Counsel:

HAROLD F. BOARDMAN, JR.,
General Counsel
FREDERICK C. KENTZ, III,
Assistant General Counsel
Hoffmann-La Roche Inc.
Nutley, New Jersey 07110

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

In our principal brief we first noted the bedrock principles of judicial restraint and neutrality long recognized as essential

to our system of jurisprudence. (PB 11)[1] We then demonstrated that the courts have no statutory authority in ADEA cases to facilitate notice to potential opt-ins under § 16(b), as neither the applicable statutory language, the relevant legislative history nor the ADEA's "remedial" purpose can support the district court's ruling. (PB 10-30)

Respondents, joined by the EEOC, in large measure attempt to shift the focus of the issues before the Court with arguments about "case management," including, most significantly, arguments supporting the *regulation* of notice to potential opt-ins — not the *facilitation* of notice, the issue decided below. In so doing they now rely on the "inherent powers" of the courts — not the statute at issue here.

Petitioner submits this reply brief to place these "case management" arguments in proper perspective and to demonstrate that the district court's "inherent powers" cannot be used as an after-the-fact justification for the rulings below.[2] The district courts simply do not have the "inherent power" to facilitate notice to parties not necessary for the adjudication of the case that serves only to maximize the number of claimants seeking money damages. In addition, this brief will demonstrate that respondents' statutory/legislative history argument does not support court facilitated notice and that their so-called "policy" concerns (a)

1. Throughout this brief PB references are to the brief for petitioner, RB references are to the brief for respondents, EEOC references are to the amicus brief of the Equal Employment Opportunity Commission and AARP references are to the amicus brief of the American Association of Retired Persons. All references to a Rule are to the Federal Rules of Civil Procedure. References to § 16(b) are to § 16(b) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b), incorporated in the Age Discrimination in Employment Act (ADEA) at 29 U.S.C. § 626(b).

2. Neither court below purported to rely on the district court's "inherent powers" to support the facilitation of notice to potential opt-ins.

have no support in the statute and thus should be addressed to the legislature, not to the courts, and (b) have, in any event, little, if any, merit.

I.

THE ISSUE BEFORE THE COURT IS THE JUDICIAL FACILITATION — NOT THE JUDICIAL REGULATION — OF NOTICE TO POTENTIAL OPT-INS.

The basis of the district judge's ruling below was his affirmative answer to the question whether he had statutory authority to "aid ADEA class plaintiffs in filling their class with all its possible members" through facilitation of notice. (PB 10) The EEOC expressly concedes that this proactive conception of his role was error (EEOC 25 n.27) and, by implication, also concedes that there is no statutory source of authority for court facilitated notice. Switching gears, however, it contends that the courts can regulate the communications between counsel for plaintiffs and potential opt-ins as a method of dealing with potentially misleading or deceptive notice. (EEOC 11) This assertion, central to its position and joined in by respondents (RB 35-36), simply has no relevancy given the context of the notice issue presented by this case.

First, by the time respondents and their counsel had commenced this lawsuit, they had already transmitted notice with an attached consent-to-join form, the R.A.D.A.R. letter, to approximately 600 potential opt-ins. (PB 2) Obviously, no attempt was made to secure judicial approval of the substance of this notice.

Second, counsel for respondents sought more than an advisory opinion or a declaratory judgment (EEOC 18) as to the substance of the court notice they proposed. Far more significantly, they

sought to compel the disclosure of the names and addresses of all potential opt-ins[3] and to have the court approve a notice which expressly states it is court authorized.[4] These two objectives have nothing to do with preventing misleading communications. They simply further the recruitment of additional opt-ins.

Third, the court approved notice here will be transmitted in the majority of instances to persons who have already *declined*

3. Although respondents apparently presume they are entitled to the names and addresses of all potential opt-ins under Rule 30 (RB 15), they disregard the fact that the discovery rules do not identify the solicitation of claims as a basis for discovery. *See* Rule 26. *See also Dolan v. Project Const. Corp.*, 725 F.2d 1263, 1267 (10th Cir. 1984). Respondents have never demonstrated that they are entitled to the names and addresses based on "merits" discovery, and neither court below addressed the issue, much less validated respondents' presumption that they are so entitled.

The EEOC's contention that the "discovery" issue is not before this Court (EEOC 4 n.2) is plainly erroneous. One need only peruse respondents' brief to realize that respondents do not agree. Moreover, the question on which this Court granted certiorari fairly encompasses the discovery issue (" . . . does the district court possess the authority to authorize, and *facilitate* notice . . . " (emphasis added)). Moreover, even if it did not, the discovery issue is inextricably linked to the notice issue, and this Court clearly has the authority to consider it on this appeal. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 246 n.12 (1981). It should also be noted that the district judge's certification of the appeal under 28 U.S.C. § 1292(b) was a certification of his Order, not the certification of a specific question. *See United States v. Stanley*, 483 U.S. 669, 677 (1987); *In re School Asbestos Litigation*, 789 F.2d 996, 1002 (3d Cir. 1986). The discovery issue is clearly within the district court's Order certified for appeal. *See* the Appendix to the Petition for Certiorari at 105a-07a.

4. That the notice approved below contains a disclaimer that the court has not taken a position on the merits of the lawsuit (*see* the Appendix to the Petition for Certiorari at 100a) does not in any way mitigate the strong tendency of the court's imprimatur to infuse the lawsuit with the court's approval. Why else would counsel seek to include language advising that the notice is court approved?

counsels' prelitigation invitation to join the action. This *second* invitation thus serves no "case management" purpose but serves only to induce its recipients to change their minds.

Fourth, the district court did not in any way attempt to restrict counsel from communicating with potential opt-ins apart from the court approved notice. The notice is thus inadequate to achieve its now asserted goal of protecting potential opt-ins from misleading information.[5]

Thus respondents' present posture — that prior judicial review will preclude misleading or deceptive notice — is completely disingenuous and bears no relation to the facts of this case. Nor do these facts warrant consideration of the EEOC's position that it is preferable to have the court regulate the communications of plaintiffs and/or their attorneys in order to protect potential opt-ins and avoid the need for court concern after the consent-to-join forms have been filed. But even as a hypothetical proposition, the EEOC's argument is flawed.

First, it raises serious First Amendment issues which the EEOC conveniently passes over. (EEOC 13 n.10) Prior restraints on communications, assuming for the moment they are an efficient way to resolve issues of "case management," are not generally permitted by our First Amendment jurisprudence. As this Court has repeatedly held: "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam), *quoting Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

5. Respondents apparently would limit the court's involvement to an initial communication with potential opt-ins. (RB 35) The EEOC does not suggest how far the court should go in screening communications with potential opt-ins after the initially-approved notice.

Second, the EEOC's proposal is, as a practical matter, unworkable. The EEOC does not offer any suggestion to deal with communications of counsel prior to the commencement of the lawsuit. Counsel can evade court screening by acting to obtain consents to join before the court acquires jurisdiction. Any subsequent efforts to regulate communications to the potential opt-ins becomes virtually meaningless as a means of avoiding the filing of invalid consents.

Finally, the "case management" argument that notice should be used to timely consolidate claims (RB 34; EEOC 12) is internally inconsistent. The court loses its role as a neutral arbiter if it authorizes notice that truly encourages joinder. *See* EEOC 6. On the other hand, the court cannot regulate the content of the notice to ensure that it is *neutrally* phrased and, at the same time, reasonably expect it to *encourage* joinder.[6]

In the final analysis, court regulated notice is an impermissible and a virtually useless "case management" tool both as a means of regulating notice and as a means of consolidating multiple claims.[7]

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6. For example, the proposed notice in this case (*see* the Appendix to the Petition for Certiorari at 99a-100a) advises the recipient of the right to opt-in *or* commence a separate action. This "neutral" notice does not encourage joinder but serves only to promote the filing of claims, an objective the EEOC concedes is improper for court notice.

7. In addition, we have already demonstrated that notice for purposes of claims consolidation is completely unnecessary given presently existing consolidation rules and procedures. (PB 35-39) *See also* note 16, *supra*, at 11. Notice that encourages joinder adds nothing to effective "case management" and serves only to assist the plaintiffs "in filling their class with all its possible members."

II.

COURT FACILITATED NOTICE IS NOT AUTHORIZED BY THE COURT'S INHERENT POWER UNDER THE FEDERAL RULES.

Both respondents and the EEOC contend that the court has "the inherent power" to facilitate notice to potential opt-ins, which power is said to repose in the catch-all provision of Rule 83[8] and in Rule 23. Neither respondents nor the EEOC argue that court notice is required because of due process or fundamental fairness considerations.[9] Indeed, the EEOC concedes that notice is not

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8. This Rule provides in pertinent part:

> In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the districts in which they act.

9. Both respondents and the EEOC do, however, argue that persons not advised of their right to opt-in will be prejudiced by principles of collateral estoppel or *stare decisis*, or will be "dissuaded" or "discouraged" if they have not participated in a collective action. (RB 19; EEOC 27 n.30) This argument is based on neither case management concerns nor the statute and, in any event, is plainly nonsensical. The essence of the argument is that claimants would be better off for having joined a collective action in which the *employer* prevailed! Obviously, claimants are *always* better off *not* to have opted-in to an action where their individual claims would have been decided against them on the merits.

Similarly unpersuasive is respondents' reliance on Rule 19 (RB 14 n.5; *see also* EEOC 17 n.16) and the cases of *Martin v. Wilks*, 57 U.S.L.W. 4616 (June 13, 1989), and *Minnesota v. Northern Securities Co.*, 184 U.S. 199 (1902). (RB 26, 39-40) Rule 19 concerns only "necessary" parties which the opt-ins clearly are not. The two cases deal with the joinder of persons who have a *legal* interest in the subject matter of the lawsuit and/or who may be *adversely* affected by the court's adjudication. The opt-ins fall into neither category.

required by due process."[10] (EEOC 11 n.8) As discussed above, their so-called "case management" objectives are insubstantial and unworkable, and the inherent "notice" power they claim for the court clearly should not be implemented by invoking whatever inherent power reposes in either Rule 83 or Rule 23.

A. Rule 83

The attempt by respondents and the EEOC to construct a justification for court facilitated notice from the catch-all provision of Rule 83 fails for a variety of reasons:

First, as the court held in *Pan American World Airways, Inc. v. United States District Court*, 523 F.2d 1073, 1078 (9th Cir. 1975), in rejecting the Rule 83 rationale for court notice to nonparties, "a procedure that deviates so sharply from the traditional role of the judiciary cannot be justified as an ad hoc rule of practice." *See also* PB 10-11.

Second, there is no rational way to limit the Rule 83 theory advanced by respondents and the EEOC to § 16(b) cases, and indeed they make no attempt to do so. Under their theory, in *all* cases a court can provide notice to nonlitigants thought to be similarly situated for the purpose of joining them in the lawsuit. Thus, for example, a court could, without resort to Rule 23, facilitate notice in a mass tort case to promote joinder as a so-called "case management" objective.[11] To construe Rule 83 so

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10. Nevertheless, the EEOC persists in arguing that court notice will provide plaintiffs and potential opt-ins with certain alleged benefits. (EEOC 7, 8, 13 & n.11, 15, 19, 26, 27 & n.30) These alleged benefits have nothing to do with "case management," have no statutory support and are apparently asserted to color the "case management" rationale.

11. The EEOC attempts to distinguish *Pan American*, a mass tort case, (Cont'd)

expansively is unwarranted, however, in light of the clearly delimited permissive joinder powers granted district courts under Rules 20, 21 and 24(b). None of these *specific* sources for permissive joinder and intervention contemplates court notice to nonlitigants.[12] It would be anomalous, indeed, were Rule 83 held to authorize a notice procedure consistent with neither those specific sources nor the traditional role of the courts.[13] Rule 83, in fact, forbids this deviation. *See* note 8, *supra*, at 7.

Third, we have already demonstrated (PB 13-18) that court

(Cont'd)
from the collective action suit because the latter is brought on behalf of similarly situated persons while in *Pan American* the notice contemplated would be to "persons who were not in any sense before the court." (EEOC 13 n.11) In fact, however, *Pan American* was an action brought on behalf of a purported class of similarly situated persons, but had been held inappropriate for Rule 23 (b)(1) or (b)(2) disposition. *McDonnell Douglas Corp. v. United States District Court*, 523 F.2d 1083 (9th Cir. 1975). The trial court's attempt to effectuate joinder by authorizing notice was rejected by the circuit court. The putative plaintiffs here are clearly no more "before the court" than were the putative plaintiffs in *Pan American*, who clearly could have intervened under Rule 24(b)(2).

12. The opt-in procedure of § 16(b) "is really an informal substitute for permissive intervention." Z. Chafee, *Some Problems of Equity* at 283 (1950).

13. The case law on which respondents and the EEOC rely for their Rule 83/inherent powers argument (RB 16,25-26; EEOC 14-17) is inapposite. In many of these cases the authority for the court's actions actually rested on a specific statute or approved rule. *See, e.g., Miller v. Central Chinchilla Group, Inc.*, 66 F.R.D. 411, 417 (S.D. Iowa 1975) (EEOC 18 n. 17), relying on Rule 23(d)(2), not any inherent power, to issue notice that a class action would not be certified. The cases cited simply evidence the principle that the court's inherent power can be invoked to properly dispose of the claims before it. *See, e.g., Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962) (cited at EEOC 14). It has not been invoked for the purpose of generating additional individual money damage claims by nonparties, a purpose completely unrelated to the "orderly and expeditious disposition" of cases. *Id.* at 630-31.

facilitated notice is inconsistent with the comprehensive enforcement scheme of the ADEA." This being the case, 28 U.S.C. § 2071(a), which mandates that all court rules "be consistent with Acts of Congress," bars reliance on Rule 83 to authorize such notice.

Fourth, court notice under the guise of Rule 83 as a means of "case management" is, we have noted, a disingenuous contention inapposite to the facts of this case and, as a hypothetical proposition, a seriously flawed concept. *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), on which respondents and the EEOC both place heavy reliance (RB 16, 18; EEOC 5, 10, 13), renders virtually illegitimate, rather than validates, the regulatory "case management" objectives they propose under their inherent powers rationale. *Gulf Oil* makes clear that under Rule 23, and presumably under Rule 83, *see id.* at 99 n.10, courts cannot without running afoul of the First Amendment impose restrictions on communications between "class representatives" or their attorneys and potential class members without first making *specific findings* that such restrictions are needed to prevent abuse of the class

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14. Although the EEOC contends (EEOC 20) that the principles of statutory construction set forth in *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981), are limited to the issue of whether a private right of action may be maintained, the language of the Court, *see* 451 U.S. at 97, is not so limited. Moreover, these general principles apply to the prescribed methods of enforcing the statute as well as the parties who may enforce it. 2A *Sutherland Statutory Construction*, § 47.23 (4th ed. 1984) In addition, the EEOC completely ignores the express notice provision provided by Congress in the ADEA, see PB 16, which demonstrates that Rule 83 notice would go well beyond the congressionally perceived need for notice. A court properly "refuses to construe [a statute] so broadly as to include what Congress gives not the slightest suggestion it intended to include." *United States v. Seaboard Survey Co.*, 622 F. Supp. 882, 886 (E.D.N.Y. 1985).

action process.[15] Thus a general practice of judicial involvement in regulating communications between "class representatives" or their counsel with nonlitigants, as proposed by the EEOC (EEOC 10-13), cannot be implemented without violating First Amendment principles.[16]

B. Rule 23

Respondents assume *arguendo* and the EEOC concedes that the notice procedures of Rule 23, adopted in 1966, are inapplicable by their terms to § 16(b) cases. (RB 18; EEOC 8 n.5) Nevertheless, they rely on these procedures by way of analogy, claiming they reflect codification of prior notice practice derived from the courts' inherent powers. (RB 18, 20, 34; EEOC 15-17)

This argument grossly misstates the historical record of the courts' inherent "notice" authority. Prior to the 1966 amendments, that authority was ill-defined and unsettled. *See* Z. Chafee, *Some*

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15. Here, of course, no such findings were made. Thus court facilitated notice in this case cannot be justified on the theory that the court was attempting to regulate the conduct of respondents or their counsel. Somewhat inconsistent with its present position, in its amicus brief to the court of appeals below at 16, the EEOC expressly relied on the holding in *Gulf Oil* in arguing for notice *facilitation* — not notice *regulation*.

16. The additional case management arguments asserted do not justify the invocation of the court's inherent power under Rule 83. That Rule should not be used to authorize notice for the purpose of claims consolidation (RB 16-17; EEOC 18) where, as we have noted (PB 35-39) all consolidation concerns can be comprehensively addressed under specific existing rules and procedures. In addition, the argument that it is *notice* under Rule 83 that permits the court to impose a "cut-off" date on opt-ins in a given case is illogical. (RB 35; EEOC 12) If the court has the power under Rule 83 to impose cut-off dates to effectively manage the case, it certainly has that power regardless of any notice-facilitating authority. But query whether Rule 83 need play any role in dealing with late arriving opt-ins. *See* Rules 20(a) and 42(b).

Problems of Equity at 230-31 (1950) (indicating that the courts had not then worked out "some kind of machinery to inform unnamed persons in the class").[17] Specifically with regard to the spurious class action, where the court's judgment was not binding on nonlitigants, there was no practice of court notice inviting joinder, and there is no authority suggesting that the courts had inherent power to facilitate notice in such cases.[18]

The 1966 amendments to Rule 23 must be viewed against this background. Those amendments provide only for class actions that bind *all* "class members," including those not before the court. Thus any inherent power codified by the notice provisions of Rule 23 as amended is limited to this context and cannot be extended to the present case. The various authorities on which respondents and the EEOC rely discussing the inherent power basis of Rule 23's notice provisions do not suggest otherwise.

In this regard, respondents misconstrue the "optional" notice provision of Rule 23(d)(2). (RB 19-20) If, as respondents concede (RB 19), the inherent power now found in Rule 23(c)(2) exists only by virtue of the binding nature of the class action, the same concession is mandated for Rule 23(d)(2)'s notice provision, which likewise applies only to binding class actions "for the protection of the members of the class or otherwise for the fair conduct of the action." Thus the "optional" notice of Rule 23(d)(2) essentially addresses due process concerns. *Elliott v. Weinberger*,

17. The courts' authority had not been clarified by the original Rule 23 which failed to provide for notice. (PB 25 n.28)

18. Of course, the opt-in procedure of § 16(b) parallels the spurious class action with regard to the non-binding effect of any judgment or settlement on nonlitigants. The "notice" cases on which the EEOC relies simply do not support its contention (EEOC 16) "that courts traditionally have had authority to direct notice in an action similar to collective actions under the ADEA." *See also* PB 25-26 n.28.

564 F.2d 1219, 1229 (9th Cir. 1977). It does not authorize notice beyond the context of the binding class action and neither reflects nor suggests the inherent power to involve the courts in a notice to persons who have no legal stake in the proceedings.

III.

THERE IS NO STATUTORY SOURCE OF POWER FOR COURT FACILITATED NOTICE.

This Point will address what appear to be the principal statutory arguments advanced by respondents and the AARP. As noted above, the EEOC implicitly concedes that there is no statutory basis for a court facilitated notice. It merely argues, albeit erroneously, that the statutory considerations and the legislative history are not inconsistent with the "case management" notice it proposes.

A. Section 16(b)'s Collective Action Clause Does Not Provide Statutory Authority For Court Facilitated Notice.

Respondents argue, in essence, that statutory authority for court facilitated notice springs full blown from the collective action clause of § 16(b), despite the absence of express authorization therein. (RB 8-9) The linchpin of the argument is its underlying assumption that Congress would perceive it to be unfair to potential ADEA claimants if the courts, at least as a last resort,[19]

19. Respondents' argument that *this* case is evidence of an inability to communicate with potential opt-ins is highly misleading. (RB 9) While they note that over 40 percent of potential opt-ins have not joined this action, the facts are that solicitations were sent to at least 600 potential opt-ins (PB 2), representing more than 80 percent of all potential opt-ins, and numerous others undoubtedly received notice of the lawsuit through plaintiffs' press conference, newspaper stories and by word of mouth. J.A. 3d Cir. Vol. I at 175a-181a. It would be most surprising if there were any more than a handful of potential opt-ins who have not had notice of the litigation.

did not advise them of the opportunity to join a collective action. This assumption is plainly erroneous.

By creating rights for private litigants, Congress does not implicitly authorize the courts to facilitate notice of those rights. Neither Congress nor the courts have traditionally viewed the role of the courts as generators of such notice. Thus something more than the mere creation of a statutory right, including a right to opt in, is required before Congress can be said to have sanctioned court notice because of "fairness" concerns. Yet respondents offer no evidence whatsoever, nor even an explanation, supporting their view that, in this one instance, Congress has radically departed from its longstanding perception of the neutral role of the judiciary.

In addition, respondents' "fairness" concept could not logically be limited to § 16(b) cases. It would apply generally to the right to intervene, *see* Rule 24, or indeed *any* case where the court became aware that a nonlitigant may have a statutory right of some type that was not being exercised. Respondents' statutory argument is, in reality, a "policy" rationale which clearly runs counter to the court's role as a neutral arbiter of disputes brought before it. Despite respondents' views on fairness, such a policy should not be implemented without express congressional approval.

Respondents also contend that court facilitated notice should be inferred from § 16(b) to promote the ADEA's "remedial" purpose. In this regard, respondent's emphasize the "pooling of resources" as a "remedial" device benefiting those already plaintiffs in the action. (RB 31; *see also* EEOC 7, 27 n.30) But a ruling authorizing court facilitated notice on this basis would have only, in this Court's words, "tactical economic significance." *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 (1978) (holding the "death knell" doctrine an insufficient basis to permit

interlocutory review of a decision not to certify a class action). Respondents thus place unwarranted reliance on what for them is a tactical maneuver, especially when there are countervailing considerations affecting employers — considerations which this Court has expressly noted. *See id.* at 476: "Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." Absent an express congressional declaration reflecting a weighing of the competing interests, a court should not act to upset the "even-handed administration of the law" as perceived and specified by the legislature. *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980). Proof that Congress intended *a judicial role* in promoting resource pooling thus requires more than merely citing to the collective action aspect of § 16(b).[20]

Finally, respondents "let the cat out of the bag" when they note in their "remedial statute" argument that "[t]o litigation strategists, the class action device is normally a potent litigation tool." (RB 32) Of course, these strategists are interested in far more than mere resource pooling. As we have previously noted (PB 12 & n.9), their central objective is the maximization of money damage claims as leverage for extracting favorable settlements and to maximize the potential counsel fee award. Thus while respondents and their counsel proceed under the guise of statutory authority and congressional intent, their real objectives are far removed from any legitimate congressional concern.

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20. Moreover, Congress obviously considered individual actions to be feasible and left it to the predilections of the individual claimant to bring a single or collective action. Respondents do not suggest that any of the claims asserted in this action are other than for substantial money damages.

B. The So-Called "Special Characteristics" of the ADEA Do Not Provide a Statutory Basis for Court Facilitated Notice.

It is clear that whether considered individually or as a group the so-called "special characteristics" (RB 11-13, 23-26) of the ADEA do not provide authority for court facilitated notice. The sum of respondents' argument is that the courts have "more expansive" jurisdiction under the ADEA than they have under the FLSA. (RB 26) To accept this argument as a basis for court facilitated notice would require one rule in ADEA cases and another rule in all other § 16(b) cases. Such a significant divergence in practice under the same statute — § 16(b) — should not be made without a clear congressional mandate — notably absent here.[21] *Cf. Mohasco Corp.*, 447 U.S. at 818. In the final analysis, if court facilitated notice had been intended, it is "quite difficult to believe that Congress would have chosen such a circuitous route to the result urged by respondent[s] and the EEOC" rather than have simply stated its intention.[22] *See Public Employees Retirement*

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21. In this regard, it is not "ironic" that courts approving "piggybacking" have failed to find authority in the statute for court facilitated notice. (RB 11-12 & n.3) The "piggyback" procedure has its source in the specific language of the statute — it is not a "judicially created remedy" as respondents suggest. *See, e.g., Anderson v. Montgomery Ward & Co., Inc.*, 852 F.2d 1098, 1015-16 & n.10 (7th Cir. 1988). Moreover, respondents' contention (RB 11-12) that the absence of court facilitated notice will "eviscerate" the ability of potential claimants to "piggyback" is hyperbolic speculation.

22. Moreover, we do not contend that all age discrimination claims are unsuitable for "class treatment". (EEOC 26 n.29) Indeed, we have noted that an individual plaintiff may seek class-wide prospective relief. (PB 34 n.44) We simply maintain that it cannot be persuasively argued that there is a statutory contemplation of, or a congressionally perceived need for, court facilitated notice when (a) the statute itself precludes the court from certifying a class binding all class members and (b) as the EEOC implicitly concedes, not all age discrimination cases are suitable for "class treatment." *See also Wards Cove Packing Co., Inc. v. Atonio*, 109 S.Ct. 2115 (1989).

System of Ohio v. Betts, 109 S. Ct. 2854, ____, 57 U.S.L.W. 4931, 4935 (1989).

C. The Legislative History Does Not Support Court Facilitated Notice.

The argument that there is nothing in the legislative history to restrict the district court from facilitating notice (RB 25; AARP 17) completely misses the mark. As previously discussed (PB 13-14 & n.12), this claimed silence of the legislative history is not a *source* of statutory authority.[23]

Respondents' attempts to glean affirmative support for court facilitated notice from the legislative history do not withstand analysis. Prior to the Portal-to-Portal Act, 61 Stat. 84 (1947), courts had not given § 16(b) the expansive interpretation

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23. The AARP also erroneously argues that the ADEA countermands the Portal-to-Portal Act's ban on representative actions (actions by non-employees) under § 16(b). (AARP 9 & n.11) The cases on which the AARP relies merely hold that certain associations are "persons" within the identical statutory definitions of the ADEA and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. But it is clear that these associations are limited to asserting claims for declaratory, injunctive or other prospective relief and are not entitled to assert damage claims on behalf of individuals. *See, e.g., International Woodworkers of America, AFL-CIO v. Georgia-Pacific Corp.*, 568 F.2d 64, 66 (8th Cir. 1977), *citing Warth v. Seldin*, 422 U.S. 490, 511 (1975). Clearly, Congress has not made a distinction between ADEA and FLSA cases as to parties who may assert damage claims under § 16(b).

The EEOC makes the curious argument that because Congress did not incorporate all of the FLSA enforcement provisions into the ADEA, the legislative history of the former should not be looked to for guidance as to legislative intent. (EEOC 24) This argument makes little sense given the fact that the specific enforcement procedure at issue here — § 16(b) — was incorporated. "[B]ut for those changes Congress expressly made, it intended to incorporate *fully* [into the ADEA] the remedies and procedures of the FLSA." *Lorillard v. Pons*, 434 U.S. 575, 582 (1975) (emphasis added).

respondents suggest.[24] Nor did Congress leave the collective action "untouched" in those amendments. (RB 29) As we have seen, Congress engrafted significant restrictions onto the collective action procedure, *e.g.*, by eliminating the representative (non-employee) action and by limiting the courts personal jurisdiction to the named plaintiff and employees who affirmatively opt i- (PB 20-25) Given the legislative history, it is hardly evidence of congressional sanctioning of court facilitated notice that Congress did not do away with the collective action procedure entirely (RB 30), especially since there is nothing in the legislative history of the Portal-to-Portal Act or in prior judicial practice reflecting a perceived need for such notice.[25] Nor do any of the other cited bits and pieces of legislative history reflect either congressional expectation of, or a perceived need for, court facilitated notice.[26]

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24. In the cases cited for this proposition at RB 28-29, the courts simply applied the statute as written. Moreover, the court in *Smith v. Stark Trucking Inc.*, 53 F. Supp. 826, 827 (N.D. Ohio 1943), neither held nor suggested that the plaintiffs were entitled to the names of those similary situated.

25. That "union activism" was a factor prompting the 1947 amendments to the FLSA (RB 29) may, in part, explain the restrictions placed on the collective action procedure, but it is manifestly not evidence which *supports* the concept of court facilitated notice.

26. We do not argue that the 1966 amendments to Rule 23 were intended to "preclude" court notice in § 16(b) cases. (RB 17, 27) We simply maintain that, given the lack of any history of court facilitated notice under § 16(b) and the newly-fashioned *express* notice provisions of Rule 23, Congress would have been expected to act, especially at the time it enacted the ADEA, if it had perceived the need for court facilitated notice in § 16(b) cases. That Congress approved the 1966 amendments through "the Enabling Act," 28 U.S.C. § 2072, rather than through affirmative legislation is irrelevant to our argumen:.

CONCLUSION

The judgment of the Court of Appeals on the question certified to it pursuant to 28 U.S.C. § 1292(b) should be reversed.

Respectfully submitted,

JOHN A. RIDLEY
One Gateway Center
Newark, New Jersey 07102-5311
(201) 622-2235
Counsel of Record

RICHARD S. ZACKIN
MICHAEL P. HICKEY
MICHAEL G. STEINBERG
CRUMMY, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE
A Professional Corporation
One Gateway Center
Newark, New Jersey 07102-5311
Counsel for Petitioner

Of Counsel:
HAROLD F. BOARDMAN, JR.,
General Counsel
FREDERICK C. KENTZ, III,
Assistant General Counsel
Hoffmann-La Roche Inc.
340 Kingsland Street
Nutley, New Jersey 07110
(201) 235-5000

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AMICUS CURIAE

BRIEF

No. 88-1268 (5)

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In The
Supreme Court of the United States
October Term, 1988

Hoffmann-La Roche Inc.,
Petitioner,
v.
Richard S. Sperling, Frederick Hemsley and Joseph Zelauskas, Individually, and on behalf of all other persons similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

Robert E. Williams
Douglas S. McDowell
Katrina Greber *
McGuiness & Williams
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for the Amicus Curiae Equal Employment Advisory Council

* Counsel of Record

Wilson - Epes Printing Co., Inc. - 789-0096 - Washington, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1203

HOFFMANN-LA ROCHE INC.,
Petitioner,
v.
RICHARD S. SPERLING, FREDERICK HEMSLEY AND JOSEPH ZELAUSKAS, Individually, and on behalf of all other persons similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

This brief amicus curiae of the Equal Employment Advisory Council (EEAC) is respectfully submitted pursuant to the written consent of the named parties and in support of the petitioner.[1]

INTEREST OF THE AMICUS CURIAE

EEAC is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership

[1] Letters of consent have been filed with the Clerk of the Court.

comprises a broad segment of the employer community in the United States, including over 200 major corporations and several trade associations which themselves have hundreds of corporate members. Its Board of Directors is composed of experts in labor and equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal aspects of EEO policies and requirements.

As employers, EEAC's members are subject to the provisions of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 *et seq.*, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and other various federal orders and regulations pertaining to nondiscriminatory employment practices. As such, many of EEAC's members may become potential respondents to civil rights charges and other employment related claims. Thus, EEAC members have a direct interest in the issue presented for the Court's consideration in this case; that is, in a case brought pursuant to the ADEA, where joinder in the action of persons other than the named plaintiffs is governed by 29 U.S.C. § 216(b), does a district court possess the authority to authorize and facilitate notice of the action to persons who have not yet filed consents to join the action.

As a significant part of its activities, EEAC has participated as amicus curiae in a number of cases before this Court and other circuits involving the interpretation and enforcement of the ADEA. *See McLaughlin v. Richland Shoe Co.*, 108 S.Ct. 1677 (1988); *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985); *Lorillard v. Pons*, 434 U.S. 575 (1978); *Shell Oil Co. v. Dartt*, 434 U.S. 98 (1977). In addition, EEAC has filed amicus briefs in other cases involving the resolution of class certification questions under Title VII, *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983); *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), as well as in other cases involving EEO class action issues, including *General Telephone Co. of the Northwest v. EEOC*, 444 U.S. 318 (1980), *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978); *Hill v. Western Electric*, 672 F.2d 381 (4th Cir. 1982), *cert. denied*, 459 U.S. 981 (1982).

Accordingly, because of the enormous impact it could have upon potential age discrimination claims involving a reduction-in-force, the discontinuation of a business, or a plant closing, this Court's consideration of this case is of vital concern to EEAC's nationwide employer constituency, who subsequently may be exposed to a flood of class action age discrimination claims. Furthermore, this case presents important questions as to whether, in the absence of legislative directive, courts should involve themselves in the authorization and provision of notice when no due process concerns are implicated.

ISSUE PRESENTED

In a case brought pursuant to the ADEA, where joinder in the action of persons other than the named plaintiffs is governed by 29 U.S.C. § 216(b), does a district court possess the authority to authorize and facilitate notice of the action to persons who have not yet filed consents to join the action?

STATEMENT OF THE CASE

In February 1985, Petitioner Hoffmann-La Roche ("Roche") implemented a company-wide reduction in force affecting approximately 1,200 employees. Pet. App. 4a, 28a, 52a. A group of affected workers formed a group known as R.A.D.A.R. (Roche Age Discriminatees Asking Redress). Pet. App. 4a. R.A.D.A.R. sent letters to approximately 600 employees asking them to join in a class action lawsuit to challenge the alleged terminations and demotions, and to solicit their written consents. Pet.

App. 4a. Over 400 plaintiffs consented to join the action, and Respondents subsequently filed an ADEA class action suit. Pet. App. 4a. After suit was filed, Respondents moved for a court-authorized direct mail notice to all potentially affected former employers who had not yet joined or "opted-in" the action. Pet. App. 4a. Petitioner opposed the motion and also sought to dismiss the 400 consents. Pet. App. 4a-6a.

The district court granted, in substantial part, the plaintiffs' motion for the notice, and denied Roche's cross-motion to invalidate the 400 consents already filed. It held that it was "permissible for a court to facilitate notice of an ADEA suit to absent class members in appropriate cases, so long as the court avoids communicating to absent class members any encouragement to join the suit or any approval of the suit on it merits." *Sperling v. Hoffmann-La Roche*, 118 F.R.D. 392, 402 (D.N.J. 1988). The court reasoned that since the ADEA was a remedial statute, court facilitation of notice would help avoid a burden on the court of "a potentially high number of separate ADEA suits." *Id.* at 403. Furthermore, it found nothing in the ADEA's language or legislative history "which might apply to the issue of court-facilitated notice, at least when it arises in a case other than a portal-to-portal compensation case." *Id.* at 402-03. The court then prepared the content of the notice to be sent, and directed the notice to be sent by plaintiffs or their counsel.

The Third Circuit affirmed, and held that the district court "does have the power to authorize notice to be sent to plaintiffs in an opt-in class filed under the [ADEA] and to review the content of such notice before it is communicated to the [potential] class member." *Sperling v. Hoffmann-La Roche*, 862 F.2d 439, 448 (3d Cir. 1988). The appellate court noted that the issue of whether court-authorized notice is permitted in ADEA class action lawsuits is one which has divided the circuits, and stated:

> We thus agree with those courts that have held that the silence of the legislative history on the question of notice to class members together with the continued congressional sanction for actions brought under the FLSA, and thereby the ADEA, on behalf of similarly situated persons must be taken to mean that Congress has imposed no bar to court-authorized notice.

Id. at 447.

The court also relied upon *Shapero v. Kentucky Bar Ass'n*, 108 S.Ct. 1916 (1988), which held that the First Amendment protects non-deceptive direct mail solicitation by attorneys of potential clients even where such solicitations are targeted to specific legal problems. In light of *Shapero*, the Third Circuit held that there were no longer any "ethical considerations" to address concerning court-authorized notice to potential opt-ins, because such notice is "designed to inform [potential] class members of the pendency of the suit and their opportunity to consent to join." *Id.* at 447. Therefore, court-authorized notice "cannot be barred under the guise of being unprofessional or unethical." *Id.*

SUMMARY OF ARGUMENT

In Title VII class action lawsuits, the issues of joinder among, and notice to, potential class members are governed by Fed. R. Civ. P. 23. However, class action suits brought under the ADEA are governed by Section 7(b) of the ADEA, 29 U.S.C. § 626(b). Section 7(b) incorporates by reference certain provisions of the Fair Labor Standards Act, and serves as the procedural mechanism by which the ADEA is enforced. Section 216(b) governs class actions and provides in part:

> No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

Therefore, the courts have generally held that ADEA class actions may only proceed under the "opt-in" requirements of § 216(b) and not under the "opt-in" requirements of Rule 23.

Neither the express language nor the legislative history of Section 216(b) of the FLSA and the ADEA justify the conclusion that the district courts are empowered to authorize notice. As court-authorized notice is not required by any due process concerns, notice can only serve to expand the scope of ADEA litigation without any explicit or implicit authorization from Congress. Moreover, to provide the notice requested by the Respondents and authorized by the courts below, the federal judiciary would have to create and implement very detailed procedures for Section 216(b) notice in the face of congressional silence. Accordingly, the Third Circuit erred in holding that the district courts are authorized to issue or facilitate such notice.

There is substantial conflict among the courts concerning the issue of court-authorized notice under Section 216(b) suits. The Eighth, Ninth, and Tenth Circuits, and certain district courts in the Fourth and Fifth Circuits hold that a district court may not issue notice or allow discovery for the purpose of ascertaining putative class members. The Second, Third and Seventh Circuits, and some district courts in the Sixth and Eleventh Circuits permit such notice and discovery. The Eleventh and D.C. Circuits have declined to decide the issue. This confusion of authority leads to the conclusion that there is no clear mandate from Congress to allow wide-ranging notice that is not available from the statutory language.

Court-authorized notice serves only to involve the court in the "stirring up of litigation." *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859, 863 (9th Cir. 1977). With this involvement, the court loses its neutrality, and, in effect, joins the plaintiffs' side of the case, as it will almost invariably be the plaintiffs' strategy to seek the tactical advantage of confronting the employer with as many claimants as possible. Indeed, if this Court were to permit notice, it would be encouraging individuals to submit consents when there may be no underlying claim to support them.

In the instant case, only persons who consented to join the action are bound; therefore, the courts below need not have served as protectors of all potential plaintiffs' due process rights. The role of the courts below was only to administer and monitor the litigation process to ensure fair trial. It was not their role, however, to give the appearance of judicial sponsorship of the notice.

The Third Circuit thus improperly extended this Court's decision *Shapero v. Kentucky Bar Ass'n*, 108 S.Ct. 1916 (1988), which involved the issue of direct mail solicitation by attorneys to potential clients, far beyond its purported reach. Its opinion is incorrectly based upon the assumption that this Court intended *Shapero* to apply to communications concerning the procedures for the joinder of parties to a lawsuit. The opinion below fails to recognize that there is a clear and definite distinction between communication that is mere advertising which involves *attorney* solicitation, and communication that is ongoing litigation which involves the participation of the *district courts*. Amicus submits that the latter is not protected speech under *Shapero*.

The instant case falls outside the parameters of "mere advertising" where potential clients consult with an attorney before any action is maintained. This case involves notice to potential claimants who must opt-in to the lawsuit by filing their consents with the court; and, their consents, upon receipt by the court, become complaints filed on behalf of each respondent. Here lies the crucial distinction—the opt-in parties have not consulted counsel before an action is maintained. Therefore, court-

authorized notice, in effect, would place the district courts in the position of allowing themselves to be used to further the solicitation of claims by attorneys on behalf of "clients" with whom they have never consulted, and whose claims have never been examined either by the plaintiffs' counsel or the court. It is this precise ethical dilemma which cannot be supported by the Third Circuit's interpretation of *Shapero*.

ARGUMENT

I. IN CLASS ACTION LAWSUITS BROUGHT UNDER THE ADEA, THE DISTRICT COURTS ARE NOT AUTHORIZED TO ISSUE OR FACILITATE NOTICE TO POTENTIAL CLASS MEMBERS WHO HAVE NOT YET FILED CONSENTS TO JOIN THE ACTION.

A. There Is Nothing In The Language Of The ADEA Or Section 216(b) That Allows The Notice Approved By The Courts Below.

Section 7(b) of the ADEA provides in pertinent part, that "the provisions of the chapter shall be enforced in accordance with the powers, remedies, and procedures provided in Sections 211(b), 216 [except for subsection (a) thereof], and 217 of this Title . . . ." 29 U.S.C. § 626(b). Section 216 of Title 29 is the codification of Section 16 of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216. In Section 216(b) of the FLSA, Congress provided a specific mechanism for class action lawsuits, a mechanism also incorporated *in toto* in the ADEA.

Section 216(b) of the FLSA provides that actions to recover damages and other relief under the statute:

> [M]ay be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall become a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.
> . . .

Thus, a class action suit brought under Section 216(b) of the FLSA is not governed by the same rules as a class action suit under Fed. R. Civ. P. 23 ("Rule 23"). Under Rule 23, once the class is certified, class members are parties to the action unless they affirmatively "opt-out" of the action. Under Section 216(b), however, class members who are not named in the complaint do not become parties to the action unless they affirmatively "opt-in" by filing with the court their written consents to join the action. *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859 (9th Cir. 1977).

Furthermore, a Section 216(b) action, often referred to as a "spurious" class action, stands on entirely different footing from a Rule 23 class action. In *LaChapelle v. Owens-Illinois*, 513 F.2d 286 (5th Cir. 1975), the Fifth Circuit addressed the distinctions between Section 216(b) and Rule 23 at great length, and held that Section 216(b) precluded a Rule 23 class action in an FLSA suit. *Id.* at 288. The primary distinction between Rule 23 and Section 216(b) is that class members in a Rule 23 action will be bound by any judgment unless they opt-out of the action. But in Section 216(b) actions, the only manner in which class members will be bound is if they affirmatively choose to opt-in to the action. Because of the *res judicata* and preclusive effects of a Rule 23 class action, court involvement is necessary to assure that the due process rights of class members are protected. *Dolan v. Project Construction Corp.*, 725 F.2d 1263, 1266 (10th Cir. 1984). No such due process rationale supports court involvement in providing notice to potential class members in a Section 216(b) action. *Id.*; *Kinney*, 564 F.2d at 863. In *Haynes v. Singer Co., Inc.*, 696 F.2d 884, 886 (11th Cir. 1983), the court recognized that because due process does not require court approval or involvement in the issuance of a Section 216(b) notice, any authoriza-

tion for court involvement must originate from the statutory language of the ADEA or the FLSA itself.

B. The Lack Of A Procedural Mechanism For Such Notice And The Confusion Among The Courts Highlights The Lack Of Clear Congressional Intent To Permit Such Notice.

Section 216(b) does not expressly specify any procedural mechanism for reaching potential plaintiffs. As a result, there is a split of authority among the courts as to whether the differences between Section 216(b) class actions and Rule 23 class actions warrant the conclusion that either the courts, the named plaintiffs, or their counsel can facilitate notice and engage in discovery relating to potential class members. The Eighth and Ninth Circuits hold that neither the district courts, nor the plaintiffs' counsel have the power to authorize notice, because due process does not require it and because no express grant of power to authorize notice is contained in the FLSA or the ADEA.[2] *McKenna v. Champion Int'l Corp.*, 747 F.2d 1211 (8th Cir. 1984); *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859 (9th Cir. 1977).[3] The Tenth Circuit has held that the court may not authorize or supervise a notice program, nor compel discovery in aid of such a program. However, a court may not preclude

[2] In *Lusardi v. Xerox Corp.*, 747 F.2d 174 (3d Cir. 1984), the court, without reaching the merits, noted the split in authority on the issue and acknowledged that there was "substantial support in the caselaw for Xerox's position that a district court may not authorize a class-based notice in an ADEA action [citing cases] . . . ." *Id.* at 176.

[3] *Accord Watkins v. Milliken & Co.*, 613 F. Supp. 408 (W.D.N.C. 1984); *Baker v. Michie Co.*, 93 F.R.D. 494 (W.D. Va. 1982); *Joyce v. Sandia Laboratories*, 22 F.E.P. (BNA) Cases 1727 (N.D. Cal. 1980); *Bittner v. Combustion Engineering, Inc.*, 19 F.E.P. (BNA) Cases 1295 (N.D. Cal. 1979); *Montalto v. Morgan Guaranty Trust Co.*, 83 F.R.D. 150 (S.D.N.Y. 1979); *Wagner v. Loew's Theatres Inc.*, 76 F.R.D. 23 (M.D.N.C. 1977); *McGinley v. Burroughs Corp.*, 407 F. Supp. 903 (E.D. Pa 1975); *Roshto v. Chrysler Corp.*, 67 F.R.D. 28 (E.D. La. 1975).

plaintiffs or their counsel from communicating with potential class members. *Dolan v. Project Construction Corp.*, 725 F.2d 1263 (10th Cir. 1984).[4]

On the other hand, the Second, Third and Federal Circuits have held that court-authorized notice is permissible in Section 216(b) actions. *Braunstein v. Eastern Photographic Laboratories, Inc.*, 600 F.2d 335 (2d Cir. 1978), *cert. denied*, 441 U.S. 944 (1979); *Sperling v. Hoffmann-La Roche*, 862 F.2d 439 (3d Cir. 1988); *United States v. Cook*, 795 F.2d 987 (Fed. Cir. 1986).[5] The Seventh Circuit has ruled that plaintiffs and their counsel can communicate with potential class members under terms and conditions prescribed by the court. Such notice, however, should not indicate court approval. *Woods v. New York Life Ins. Co.*, 686 F.2d 578 (7th Cir. 1982).[6] Finally, the District of Columbia and Eleventh Circuits have declined to address the issue of court-authorized notice. *Haynes v. Singer Co.*, 696 F.2d 884 (11th Cir.

[4] *Accord Burt v. Manville Sales Corp.*, 116 F.R.D. 276 (D. Colo. 1987); *Walker v. Mountain States Telephone and Telegraph Co.*, 112 F.R.D. 44 (D. Colo. 1986); *Owens v. Bethlehem Mines Corp.*, 108 F.R.D. 207 (S.D.W.Va. 1985); *Goerke v. Commercial Contractors & Supply Co.*, 600 F. Supp. 1155 (N.D. Ga. 1984); *Hallas v. Western Electric Co.*, 26 E.P.D. (CCH) para. 31,958 (S.D. Ohio 1981).

[5] *Accord Palmer v. Reader's Digest Ass'n, Inc.*, 39 E.P.D. (CCH) para. 36,039 (S.D.N.Y. 1986); *Pirrone v. North Hotel Associates*, 108 F.R.D. 78 (E.D. Pa. 1985); *Vivone v. Acme Markets*, 105 F.R.D. 65 (E.D. Pa. 1985); *Soler v. G & U, Inc.*, 568 F. Supp. 313 (S.D.N.Y. 1983); *Allen v. Marshall Field & Co*, 93 F.R.D. 438 (ND. Ill. 1982); *Johnson v. American Airlines, Inc.*, 531 F. Supp. 957 (N.D. Tex. 1982); *Frank v. Capital Cities Communications*, 88 F.R.D. 674 (S.D.N.Y. 1981); *Monroe v. United Air Lines*, 90 F.R.D. 638 (N.D. 1981); *Riojas v. Seal Produce, Inc*, 82 FR.D 613 (S.D. Tex. 1979); *Lantz v. B-1202 Corp.*, 429 F. Supp. 421 (E.D. Mich. 1977).

[6] *Accord Heagney v. European American Bank*, 122 F.R.D. 125 (E.D.N.Y. 1988); *Behr v. Drake Hotel*, 586 F. Supp. 427 (N.D. Ill. 1984).

1983); *Thompson v. Sawyer*, 678 F.2d 257 (D.C. Cir. 1982).

In view of the conflicting authority among the courts, and the lack of express statutory authorization concerning notice, any analysis of the issue must begin with an examination of the legislative history of Section 216(b) under the FLSA and the ADEA. As discussed below, Congress "intended to severely limit the burden on the defendant and the participation of the court" while "still providing for collective and representative actions." *Dolan*, 725 F.2d at 1267. Therefore, to follow the Third Circuit's decision below and provide court-authorized notice in Section 216(b) actions would violate the congressional intent "to discourage collective litigation by virtue of the requirement of an affirmative act by each plaintiff." *Id.*; *accord McKenna*, 747 F.2d 1211. It makes sense, then, to follow the rationales set forth in *Kinney*, *Dolan* and *McKenna*, and to read the statute as prohibiting rather than permitting such notice. Indeed, "the silence of Congress on the subject [of notice in Section 216(b) actions] speaks its own message, that being that Congress did not intend a notice mechanism to be used with the act." *Baker v. Michie Co.*, 93 F.R.D. 494, 496 (W.D. Va. 1982).

C. Congress Severely Limited The District Courts' Involvement In Section 216(b) Class Action Suits When It Amended The FLSA.

The relevant portions of Section 216(b) were originally enacted as Section 5 of the Portal-to-Portal Act of 1947, Pub. L. 49, ch. 52, 61 Stat. 87. The primary purpose of the Act was to "remedy deficiencies in the interpretation and procedural management of the FLSA as originally formulated in 1938." *Dolan*, 725 F.2d at 1266. In 1947, the FLSA was amended to provide that potential plaintiffs had to file consents with the court to be included in the plaintiff class in an FLSA class action. *See McKenna*, 747 F.2d at 1214. This amendment was

included as part of a congressional intent to stem the flood of FLSA class action litigation in the wake of this Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), which held that certain time not previously considered part of a worker's compensable workday was included as compensable time for purposes of the FLSA minimum wage and overtime provisions. Clearly the amendment was intended to halt the type of class action lawsuits spawned by *Anderson*.

In *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859 (9th Cir. 1977), the Ninth Circuit was greatly influenced by a district court's examination of the legislative history of Rule 23 and Section 216(b) in *Roshto v. Chrysler Corp.*, 67 F.R.D. 28 (E.D. La. 1975), which involved an ADEA class action lawsuit. The district court compared Rule 23 with Section 216(b) and concluded that, with respect to the latter, "[Congress's] failure to provide notice to the class can not [sic] be attributed to mere oversight." *Roshto*, 67 F.R.D. at 29. The *Roshto* court acknowledged that notice serves the function of informing persons that there has been a possible violation of their rights for which they may seek a legal remedy; but, it discounted this as an interest which a class notice is designed to further. Instead, the purpose of the class notice is to satisfy due process and thereby permit a judgment to be binding on all class members. *See McGinley v. Burroughs Corp.*, 407 F. Supp. 903 (E.D. Pa. 1975).

Next, the Tenth Circuit in *Dolan v. Project Construction Corp.*, 725 F.2d 1263 (10th Cir. 1984), interpreted the legislative history of Section 216(b) as indicating that Congress intended not only to restrict *Anderson*-type suits, but more generally to limit the availability of *all* FLSA class actions, and to limit the burden on the defendant and the participation of the court. The court stated:

> Further evidence of the intent to remove the court from active participation in a representative action

> under Section 216(b) is Congress' careful drafting to avoid due process difficulties for potential class members who do not participate in the filed representative actions.

Dolan, 725 F.2d at 1267 (citation omitted). The *Dolan* court refused to read into Section 216(b) authority for the district court to notify potential class members, because such an interpretation would expand the availability of FLSA class actions. *Id.*

Consistent with *Dolan*, the Eighth Circuit in *McKenna v. Champion Int'l Corp.*, 747 F.2d 1211 (8th Cir. 1984), stated:

> While it is evident that the 1947 amendments were aimed at the outbreak of the litigation following *Anderson*, we cannot conclude from the legislative history that the amendments were to have any effect other than to limit the availability of all FLSA class actions, as was concluded in *Dolan*. We also observe that the opt-in amendment was added at a time when Rule 23 made no provisions as to opting in or out, but was so worded that in "pure" class actions all members would be bound. After concluding that the amendment was for the purpose of remedying a specific complaint, but also had the generalized effect of limiting the availability of all FLSA actions, we still are faced with the fact that the legislative history is totally silent on the issue of notice in Section 216(b) proceedings.

McKenna, 747 F.2d at 1214. Accordingly, the *McKenna* court concluded:

> In light of the foregoing, *we cannot justify reading into the statute power that is neither legislatively granted nor constitutionally required.* We hold, therefore, that a district court lacks the authority to direct notice to potential class members in suits brought under the [ADEA].

Id. (Emphasis added).

The legislative history of Section 216(b) clearly indicates that Congress was concerned that employers across the country "would be forced to comb through payroll records of their entire workforce, trying to determine whether, with the newly mandated travel time included, additional overtime compensation should have been paid." *United States v. Cook*, 795 F.2d 987, 993 (Fed. Cir. 1986) (quoting *Vivone v. Acme Markets, Inc.*, 105 F.R.D. 65, 68 (E.D. Pa. 1985)). Congress, in effect, considered it vitally important to shield employers from "surprise liability, and the attendant discovery burden [which] could [have been] imposed on employers." *Id.* at 993. Congress adopted the opt-in requirement of Section 216(b) —a departure from the ordinary opt-out procedures of Rule 23—in order to give employers a greater measure of certainty about whom they would be facing in court and to protect against half-hearted litigation. *LaChapelle v. Owens-Illinois*, 64 F.R.D. 96, 98 n.3 (N.D. Ga. 1974), *aff'd*, 513 F.2d 286 (5th Cir. 1975).

The Third Circuit below incorrectly concluded that "[t]here is nothing to suggest that in eliminating representative actions Congress intended to affect what it called the collective action." *Sperling v. Hoffmann-La Roche*, 862 F.2d at 445. Rather, it chose to ignore that Section 216(b) was enacted as a measure to prohibit precisely the kind of Rule 23 notice-based class action procedures it adopted.[7] As the Court of Appeals for the Ninth Circuit held:

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[7] The court's reliance on the "similarly situated" language in Section 216(b) as "significant evidence that Congress did not intend to preclude notice to class members by the 1947 amendments. . . . ," is without merit. *Id.* at 446. The court, in effect, is arguing that Congress intended the courts to make Rule 23 type class certifications in Section 216(b) actions. Under Rule 23, the court first certifies the class, and then issues notice to members. The consideration of whether potential plaintiffs in a Section

> [T]he FLSA contains no specific authority for giving notice to class members who are potential party plaintiffs. Rule 23, of course provides court-directed notice to class members . . . most courts that have interpreted the FLSA, including this court, have held that neither the named plaintiffs, their counsel, nor the court have the power to provide notice to FLSA [and ADEA] class members.

Partlow v. Jewish Orphans' Home, 645 F.2d 757, 758-59 (9th Cir. 1981) (citations omitted). In the instant case, the Third Circuit's court-authorized notice facilitated the class action, and to that extent, was inconsistent with the contrary legislative intent to restrict FLSA class actions.

D. Congress Clearly Intended That Class Action Age Discrimination Claims Would Be Brought Under The Enforcement Scheme Of Section 216(b) Of The FLSA.

The ADEA's legislative history does not address whether Rule 23 type notice is available to potential class members who have not yet filed consents under Section 216(b). However, the history shows that the FLSA, rather than Title VII or the National Labor Relations Act (NLRA), was deliberately chosen as the model for the ADEA's enforcement procedures.[8] For this reason, the court in *McGinley v. Burroughs Corp.*,

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216(b) action are "similarly situated" is quite different. The members must first opt-in before the court can make that determination.

Assuming *arguendo*, that the district courts are empowered to authorize such notice, the courts below and the Respondents failed to show that such notice is appropriate in this case, where there has been no determination that the potential class members and the named plaintiffs were "similarly situated."

[8] *See* Hearings on H.R. 4221 Before General Subcomm. on Labor of the House Comm. on Education & Labor, 90th Cong., 1st Sess. 1 (1967) (remarks of Messrs. Finigan, Harmon, and Meiklejohn, and Representatives Price and Pucinski); Hearings on S. 830 and S. 788 Before Subcomm. on Labor & Public Welfare, 90th Cong., 1st Sess. 29 (1967) (remarks of Senator Javits).

407 F. Supp. 903 (E.D. Pa. 1975), held that Rule 23 is independent of the statutory suit authorized by Section 216(b); and therefore, its notice provisions and remedies are unavailable in ADEA suits:

> The legislative history of the [ADEA] clearly establishes that the Act is to be enforced in accordance with the procedures of the [FLSA]. Congress at the time the [ADEA] was adopted was well aware of Rule 23 of the Federal Rules. If Congress had wished to adopt the Rule 23 enforcement technique for the [ADEA], it would not have explicitly stated that the Act was to be enforced in accordance with the [FLSA]. Accordingly, we find that a class action under the Act is a statutory class action, independent of and unrelated to the class action covered by Rule 23 of the Federal Rules of Civil Procedure.

Id. at 911; *see also LaChapelle v. Owens-Illinois, Inc.*, 513 F. Supp. 286, 288-89 (5th Cir. 1975).[9] The holding in *McGinley* and other decisions is consistent with the statement found in the Advisory Committee notes to the 1966 amendments to Rule 23: "The present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended." Amendments to Rules of Civil Procedure, 39 F.R.D. 98, 104 (1966).

Consequently, Congress explicitly incorporated into the ADEA certain procedural and enforcement mechanisms of the FLSA "which would afford more expeditious and individual treatment of claims of age discrimination than those afforded by either the National Labor Relations Act or Title VII." *Naton v. Bank of California*, 72 F.R.D. 550, 555 (N.D. Cal. 1976).

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[9] Accordingly, the courts have held that a suit authorized by Section 216(b) may not be conducted as a Rule 23 class action. *See, e.g., Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859 (9th Cir. 1977); *Schmidt v. Fuller Brush Co.*, 527 F.2d 532 (8th Cir. 1975); *Groshek v. Babcock & Wilcox Tubular Products Div.*, 425 F. Supp. 232 (E.D. Wis. 1977).

Congress adopted a streamlined approach to resolving ADEA disputes in part because of its concern that delay inevitably would prejudice older persons more cruelly than members of other groups. As Senator Javits noted, "*Such delay is always unfortunate, but it is particularly so in the case of older citizens to whom, by definition, relatively few productive years are left.*" Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. 24 (1967) (prepared statement of Senator Javits) (Emphasis added).

Congress' decision to subject the ADEA to the requirements of Section 216(b) was succinctly summarized by Senator Javits:

> The enforcement techniques provided by S. 830 are directly analogous to those available under the [FLSA]; in fact, S. 830 incorporates by reference, to the greatest extent possible, the provisions of the [FLSA].
>
> * * * *
>
> We now have the enforcement plan which I think is best adapted to carry out this age-discrimination-in-employment ban with the least overanxiety or difficulty on the part of American business and with complete fairness to the workers. I think this is one of the most important aspects of the bill.

103 Cong. Rec. 31254 (1967). Therefore, the legislative history and the statutory language of the ADEA make clear that Congress intended to adopt the special and distinct notice procedures contained in Section 216(b) for class action age discrimination claims, rather than those in Rule 23. As one court observed:

> [We] cannot, however, ignore the scalpel-like precision with which Congress excised Section 216(b), leaving behind subsections (a), Section 211(b), leaving behind subsections (a), (c), and (d), and Section 217 from Table 29 for incorporation into the [ADEA]. Nor can [we] assume that Congress was unaware of the Rule 23 or of its wide acceptance and use in Title VII discrimination suits.

Naton v. Bank of California, 72 F.R.D. 550, 556 n.11 (N.D. Cal. 1976).

The application of Rule 23 notice in the instant case potentially could result in court-authorized notice being given in every age discrimination claim involving a reduction-in-force, the discontinuation of a business or a plant closing. The Third Circuit's rationale of permitting Rule 23-type notice which would give absent class members the opportunity to opt-in the action, therefore, directly contravenes congressional intent.

In addition, since Section 216(b) does not contain the rigorous conditions that precede certification of "pure" class actions, the Respondents "should not enjoy the benefits of court-directed notice without carrying the burdens of class certification." *McKenna*, 747 F.2d at 1213. Neither should the courts below be permitted effectively to transform Section 216(b) actions into Rule 23 actions, since "adopting a portion of the procedures of Rule 23 in age discrimination suits is just as contrary to the Congressional intent expressed in the [ADEA], as adopting Rule 23 *en toto*." *Hill v. Western Electric Co.*, 76 F.R.D. 4, 6 (M.D.N.C. 1976) (quoting *McGinley v. Burroughs Corp.*, 407 F. Supp. 903, 911 (E.D. Pa. 1975). Indeed, "[i]t is the responsibility of the Congress and not of the courts to alter the explicit provisions of the Act, if they are to be altered." *Hill*, 76 F.R.D. at 6.

II. COGENT POLICY REASONS EXIST TO DISCOURAGE AND AVOID INVOLVING EITHER THE PLAINTIFF OR THE COURT IN SOLICITING POTENTIAL CLASS MEMBERS TO FILE CLAIMS.

A. The District Court Should Not Place Its Imprimatur On Notice Which Creates An Unwarranted Expansion Of Litigation.

The absence of a notice requirement in Section 216(b) actions has led some courts to prohibit class notice in ADEA cases in order to avoid the appearance of attorney solicitation. *Roshto v. Chrysler Corp.*, 67 F.R.D. 28 (E.D.

La. 1975), was the first in a long line of cases which have adhered to this policy:

> There are important policy considerations of ancient vintage which militate strongly against the giving of notice where not required by due process. The awakening of sleeping plaintiffs by either the plaintiff or the court would fly in the teeth of centuries old doctrine against the solicitation of claims. While we sympathize with the plight of the unascertained number of potential plaintiffs who may be entirely unaware of their legal rights, we must not put our imprimatur on a procedure designed to stir up litigation. This statement is made only because we are unaware of any legal precedent or principle which supports the sugestion that either the plaintiff or the court has any moral, legal or ethical duty 'to act as unsolicited champions of others.'

Id. at 30.

The underlying policies of *Roshto* have been followed by several other courts.[10] In *Kinney, supra,* the court barred court-authorized notice under Section 216(b), reasoning that if notice is not required by due process, neither the court nor the plaintiff should be involved "in the stirring up of litigation in solicitation of claims." *Kinney,* 564 F.2d at 863. From a practical standpoint, the *Dolan* court admonished:

> To actively involve the trial in the sending of notice would necessarily involve engrafting certain additional class action procedures to protect the administration of the case from improper certification and

[10] *See, e.g., Dolan v. Project Construction Corp.,* 725 F.2d 1263 (10th Cir. 1984); *McKenna v. Champion Int'l Corp.,* 747 F.2d 1211 (8th Cir. 1984); *Kinney Shoe Corp. v. Vorhes,* 565 F.2d 859 (9th Cir. 1977); *Goerke v. Commercial Contractors & Supply,* 600 F. Supp. 1155 (N.D. Ga. 1984); *Montalto v. Morgan Guaranty Trust Co.,* 83 F.R.D. 150 (S.D.N.Y. 1979); *Wagner v. Loew's Treatre's, Inc.,* 76 F.R.D. 23 (M.D.N.C. 1977); *McGinley v. Burroughs Corp.,* 407 F. Supp. 903 (E.D. Pa. 1975).

> issuance of notice. We refuse to begin this process without clear Congressional guidance.

Dolan, 725 F.2d at 1268.

B. The Proper Function Of The District Courts In Section 216(b) Cases Is To Exercise Only A Supervisory Role, Not To Engage In Active Solicitation Of Plaintiffs.

The policy of restraint reflected in *Roshto,* however, was rejected by the Third Circuit below, which instead relied in part, upon the Seventh Circuit's decision in *Woods v. New York Life Ins. Co.,* 686 F.2d 578 (7th Cir. 1982). But even the *Woods* court, which allowed notice, had trouble with the notion that notice should be authorized or facilitated by the court:

> [T]here is a serious question whether a federal judge has the power to issue invitations to join a lawsuit. That activity changes the character of the judge from that of an adjudicator of disputes brought to him to that of a kind of town crier, ringing the tocsin to awaken those who may be sleeping on their rights; and we should require more . . . to conclude that a federal judge, whose authority is confined by Article III of the Constitution to the exercise of the judicial power of the United States, may communicate with nonparties in this way.

Woods, 686 F.2d at 581-82.[11] The Eighth Circuit in *McKenna v. Champion Int'l Corp.,* 747 F.2d 1211 (8th Cir. 1984), found the *Woods* language to be instructive, and it thus criticized the *Braunstein* decision relied upon by the court below:[12]

[11] The *Woods* court subsequently allowed plaintiffs' counsel to send court-approved notice; but, it did not allow the notice to be sent on the court's letterhead or with its signature.

[12] In *Braunstein v. Eastern Photographic Laboratories, Inc.,* 600 F.2d 335 (2d Cir. 1978) (per curiam), *cert. denied,* 441 U.S. 944 (1979), the Second Circuit held that due process does not require

> The contrary, per curiam opinion of the Second Circuit in *Braunstein* addressed this issue in conclusory fashion and relied on several unpublished district court opinions. It based its holding on a liberal construction of the FLSA's broad remedial purpose and its desire to avoid a multiplicity of suits. We do not believe that these general considerations are persuasive in light of the carefully reasoned and articulated opinions in *Kinney*, *Dolan*, and *Woods*.

McKenna, 747 F.2d at 1214.[13]

From these decisions, a sound policy emerges—that is, the district courts should not engage in the active solicitation of plaintiffs. The proper role of the courts in Section 216(b) actions is to engage in passive duties and limited jurisdiction. Therefore, the "role of the court in [such actions] must be supervisory only." *Dolan*, 725 F.2d at 1267.

C. Court-authorized Notice Serves No Remedial Purposes And Improperly Gives The Appearance Of Judicial Sponsorship Of Plaintiffs' Case.

The *Braunstein* decision rests upon the broad assumption that "notice to potential plaintiffs is a good idea." *Goerke v. Commercial Contractors & Supply*, 600 F. Supp. 1155, 1159 (N.D. Ga. 1984). But, as the court in *Goerke* noted:

> "Nowhere in [*Braunstein*] does the court put forward any rationale for why this notice should come

court-authorized notice to potential class members in Section 216(b) actions. The court, however, refused to extrapolate from this that a court lacks the power to authorize notice. It thus concluded that notice could be sent bearing the "imprimatur" of the court.

[13] The Third Circuit's opinion failed to mention that both *Braunstein* and *Woods* have been criticized by other courts for such overreaching policies. *See, e.g., Owens v. Bethlehem Mines Corp.*, 108 F.R.D. 207 (S.D.W.Va. 1985); *Goerke v. Commercial Contractors & Supply*, 600 F. Supp. 1155 (N.D. Ga. 1984); *see also Baker v. Michie*, 93 F.R.D. 494 (W.D. Va. 1982) (criticizing *Braunstein*).

> *from the court.* One of Congress' goals in passing the Portal-to-Portal Act, as noted by the Tenth Circuit in *Dolan*, was to restrict the involvement of the courts, and to define and limit the courts' jurisdiction.

Id. at 1160 (citation omitted) (Emphasis in original).

Contrary to the Third Circuit's view that "court-authorized notice . . . serve[s] the remedial purpose of the ADEA . . . .," such notice serves only to involve the court in the "stirring up" of litigation. *Sperling*, 862 F.2d at 447. With this involvement, the court loses its neutrality, and, in effect, joins the plaintiffs' side of the case, as it will almost invariably be the plaintiffs' strategy to seek the tactical advantage of confronting the employer with as many claimants as possible.

For as one court cautioned, court-authorized notice, "no matter how artfully drawn by counsel or the court or both, is bound to carry a strong intimation of an affirmative invitation to come join the current plaintiff in an assault on the defendant-employer." *Baker v. Michie Co.*, 93 F.R.D. 494, 496 (W.D. Va. 1982). Indeed, if this Court were to permit notice, it would be encouraging individuals to submit consents when there may be no underlying claim to support them, and no effective mechanism for either the court or counsel to examine and review such claims. In Section 216(b) cases, only persons who consented to join the action are bound; therefore, the courts below need not have served as protectors of all potential plaintiffs' due process rights. The role of the courts below was only to administer and monitor the litigation process to ensure fair trial. It was not their role, however, to give the appearance of judicial sponsorship of the notice. *See Dolan*, 725 F.2d at 1269; *Walker v. Mountain States Tel. & Tel. Co.*, 112 F.R.D. 44, 47 (D. Colo. 1986).

III. THE THIRD CIRCUIT MISCONSTRUED *SHAPERO*, AND FAILED TO DRAW A DISTINCTION BETWEEN PROTECTED COMMUNICATION AND ACTIVE ASSISTANCE TO PLAINTIFFS BY THE DISTRICT COURTS.

The Third Circuit rejected the rationale of the *McKenna* court, and instead adopted the holding of the *Braunstein* court that concern for unethical solicitation had been quelled by decisions of this Court concerning attorney solicitation. *See, e.g., Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981); *In Re Primus*, 436 U.S. 412 (1978); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978). However, the court in *Baker v. Michie*, 93 F.R.D. 494 (W.D. Va. 1982), had the following criticism of such a policy position:

> *Braunstein* also referred to the recent trend in the law allowing attorney advertising as eroding the logic of the *Kinney Shoe* court's holding that permitting notice violated strong policy considerations against the solicitation of claims. Such reasoning is less than persuasive, however, except on a surface level. *An analysis of this matter shows that the trend, if that is what it is, is severely circumscribed, allowing in general the advertising of availability of legal services, a far cry from the notice contended for in this case, a notice which zeroes in on a particular potential plaintiff in a particular litigation.* . . . In short, this court does not read the relaxation of the stringency of the rule against advertising to relax similarly the stringencies of the rule against stirring up of litigation.

Baker, 93 F.R.D. at 496. (Emphasis added).

In addition, the Third Circuit relied upon this Court's recent decisions in *Shapero v. Kentucky Bar Ass'n*, 108 S.Ct. 1916 (1988), and *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985). In *Shapero*, this Court held that the First

Amendment protects targeted, direct-mail solicitation of clients by lawyers so long as the solicitation is not false or misleading. The Court reasoned:

> The court below disapproved petitioner's proposed letter solely because it targeted only persons who were 'known to need [the] legal services' offered in his letter. . . . But the First Amendment does not permit a ban on certain speech merely because it is more efficient; the State may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable. . . .
>
> * * * *
>
> [M]erely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech.

Id. at 1921-22; 1923. From this rationale, the Third Circuit held that:

> [I]t follows that communications which the district court finds to be truthful and nondeceptive, designed to inform putative class members of the pendency of the suit and their opportunity to consent to join cannot be barred under the guise of the being unprofessional or unethical.

Sperling, 862 F.2d at 447; *see also Heagney v. European American Bank*, 122 F.R.D. 125, 131 (E.D.N.Y. 1988) (*Shapero* allows some court compelled notice, but no authority cited that requires prior court authorization of the court for such notice).

The *Heagney* court declined to "place its imprimatur" on the notice; but that court, like the Third Circuit, extended *Shapero* far beyond its purported reach. Both courts use *Shapero* out of context, because those opinions are based upon an improper assumption that this Court intended *Shapero* to apply to communications concerning

the procedures for the joinder of parties to a Section 216(b) lawsuit—issues not presented in *Shapero*.

The opinions fail, moreover, to recognize that there is a clear and definite distinction between communication that is mere advertising which involves *attorney* solicitation, and communication that is ongoing litigation which involves the participation of the *district courts*. Amicus submits that even if the former is protected speech under *Shapero*, the latter surely is not. Nowhere in *Shapero* did this Court address the propriety of the district courts' participation in the facilitation of notice to potential plaintiffs in ongoing litigation. Instead, this Court stated that bar associations that regulate attorney advertising and solicitation of potential clients must comply with certain First Amendment requirements. The decision in no way authorizes virtually unlimited solicitation of potential plaintiffs who have other avenues of relief, especially where such notice would be contrary to the statutory authority upon which a cause of action is based.

The instant case thus falls outside the parameters of "mere advertising" where potential clients consult with an attorney before any action is maintained. This case involves notice to potential claimants who must opt-in to the lawsuit by filing their consents with the court; and, their consents, upon receipt of the court, become complaints filed on behalf of each respondent. Here lies the crucial distinction—the opt-in parties have not consulted counsel before an action is maintained. Therefore, court-authorized notice, in effect, would place the district courts in the position of allowing themselves to be used to further the solicitation of claims by attorneys on behalf of "clients" with whom they have never consulted.

In addition, as the number of clients and prospective class-members grows, the opportunities for and incentives to overreach and disregard potential conflicts of interest multiply. It this precise ethical dilemma which cannot

be supported by the Third Circuit's interpretation of *Shapero*.[14] Indeed, as the *Dolan* court stated:

> [T]he gulf that separates the restriction of protected communication and active assistance of plaintiff in seeking fellow parties is wide. Under no theory of legal communication is the court justified in undertaking an active role in either discovering or contacting additional parties. The role of the court in [Section] 216(b) actions is one of administering and monitoring the litigation process to ensure a fair trial for all parties.

Dolan, 725 F.2d at 1268-69.

Accordingly, *Shapero*, does not compel the conclusion that the notice provided by the courts below is required either by the ADEA, FLSA or the Constitution. *Shapero* involves the general constitutional principle that state bar associations acting without the power of the courts or Congress, cannot unduly restrict the free flow of commercial speech between attorneys and their potential clients. *Shapero* also makes clear, however, that such solicitation cannot be misleading, false, abusive or involve "unlawful" activity. *Id.* at 1927-28.

The Constitution, further, does not describe in any detail the scope of forms of action or the procedures to be used in civil litigation in the federal courts. Rather, the framers left it to Congress to determine how civil actions were to be tried. Certainly, aside from rights provided by the underlying statute, Congress never contem-

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[14] The *McKenna* court was also concerned that:

> [D]irect-mail solicitation of particular plaintiffs for a particular lawsuit closely approaches in-person solicitation. *See Baker v. Michie Co.*, 93 F.R.D. 494, 496 (W.D. Va. 1982). These communications from counsel 'are not subject to third-party scrutiny and consequently are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.'

McKenna, 747 F.2d at 1216.

plated that individuals would be able to participate in ADEA litigation in a manner that would disrupt the statutory scheme, nor would any constitutional principle compel such a result. The legislative history clearly indicates that Congress intended to limit the scope of Section 216(b) class notice as compared with notice in actions brought under Rule 23. And it is for Congress, and not the courts, to abandon congressional silence and change the ADEA's enforcement mechanisms.

CONCLUSION

For the foregoing reasons, EEAC respectfully urges that the judgment of the court of appeals should be reversed.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
KATRINA GRIDER *
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for the Amicus Curiae Equal Employment Advisory Council

May 18, 1989

* Counsel of Record

AMICUS CURIAE

BRIEF

No. 88-1203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HOFFMANN-LA ROCHE INC.,
Petitioner,

v.

RICHARD SPERLING, FREDERICK HEMSLEY AND JOSEPH ZELAUSKAS, Individually, and on behalf of all other persons similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF RESPONDENTS

STEVEN S. ZALEZNICK
CHRISTOPHER G. MACKARONIS
CATHY VENTRELL-MONSEES *

AMERICAN ASSOCIATION OF RETIRED PERSONS
1909 K Street, N.W.
Washington, D.C. 20049
(202) 662-4957

Attorneys for Amicus Curiae American Association of Retired Persons

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF AMICUS CURIAE OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

The American Association of Retired Persons (AARP) is a not-for-profit corporation of more than thirty million persons age fifty and older. AARP is the largest organization of its kind in America. In representing the interests of its members, AARP seeks to promote the independence, dignity, and well-being of older Americans. More than eight million AARP members are actively em-

ployed, many of whom are covered by the provisions of the Age Discrimination in Employment Act of 1967, as amended, "ADEA," 29 U.S.C. § 621 *et seq.*

This case involves the authority of the federal courts to enable those who claim to be victims of discrimination to inform one another of their right to join together in litigation under the ADEA. The ability to exercise this right often depends on the issuance of adequate notice to the class. Thus, notice is crucial to effective enforcement of the ADEA. For these reasons, AARP respectfully submits this brief *amicus curiae* in support of affirmance of the Third Circuit's decision below.

ISSUE PRESENTED

Whether a federal court has the authority to permit plaintiffs to send notice to similarly situated individuals under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.*

STATEMENT OF THE CASE

Following a reduction-in-force of approximately 1,200 employees at Hoffmann-La Roche Inc. (hereinafter "Roche" or "Petitioner"), a number of former employees organized a group called R.A.D.A.R. (Roche Age Discriminatees Asking Redress) and filed suit under the ADEA and state law. Pet. App. 4a. The group contacted over 600 employees who had been riffed on the same day, 400 of whom filed consents to participate in the suit. *Id.*[1] The plaintiffs then sought discovery and the Court's permission to send notice to class members who had yet to join the suit.

[1] Roche unsuccessfully sought to dismiss these consents as the product of improper solicitation. The court of appeals held that it lacked jurisdiction to consider the issue because the district court had denied Roche's motion and had refused to certify the issue for appeal. Pet. App. 10a. As a result, the validity of the consents is not before this Court.

The district court granted plaintiffs' motion, reasoning that based on the language and purposes of the ADEA, it was "permissible for the court to facilitate notice of an ADEA suit to absent class members in appropriate cases." Pet. App. 70a. The district court cautioned that such notice should provide objective information so as to avoid "any encouragement to join the suit or any approval of the suit on its merits." *Id.*[2] Given the split in the circuits on the authority of the courts to approve of notice, the district court certified the issue for appellate review under 28 U.S.C. § 1292(b).

The Third Circuit affirmed, finding the district court had not abused its discretion in authorizing the notice. The court reasoned that the language of § 16(b) of the Fair Labor Standards Act of 1938, "FLSA," 29 U.S.C. § 216(b), as incorporated into the ADEA, clearly authorized "similarly situated" individuals to sue on each other's behalf. Pet. App. 16a. The Third Circuit held that this statutory authorization implied a right to notify similarly situated individuals of their opportunity to join suit. *Id.* Moreover, the Third Circuit concluded that prohibiting notice would make a congressionally sanctioned form of action meaningless.

SUMMARY OF ARGUMENT

Twenty-two years ago, Congress enacted the ADEA to combat age discrimination in employment. To meet this challenge, Congress borrowed aspects of Title VII of the Civil Rights Act of 1964[3] and the FLSA, and meticulously crafted them with the ADEA's own provisions to ensure a broad enforcement scheme.

[2] The notice stated that the "court has taken no position regarding the merits of plaintiffs' claims or Roche's defenses," and was authorized by the district court. Pet. App. 111a.

[3] 42 U.S.C. § 2000e *et seq.*

The authority of the federal courts to permit notice to victims of age discrimination derives from the structure and purposes of the ADEA itself, specifically § 7(c) and § 7(b). Congress carefully designed the ADEA, providing for both a broad cause of action to all aggrieved persons as well as injunctive relief under § 7(c). These classic benchmarks of systemic enforcement evidence the high priority Congress attached to class treatment under the ADEA and support the authority of the federal courts to enable class members to notify others to join the suit.

The ADEA's selective incorporation of provisions of the FLSA further demonstrates Congress' intent to provide the authority and means for effective class enforcement. Section 7(b) of the ADEA incorporates language from § 16(b) of the FLSA permitting individuals to bring suit on behalf of others similarly situated and requires that those who join the suit file their consent with the court. Implicit in the language of § 16(b) is the right to inform others similarly situated of their rights and obligations.

Notice provides an effective tool for class enforcement of the ADEA. Prohibiting notice to the class would prevent potential victims from learning about and exercising the rights Congress granted them under the ADEA. Such a result disregards the clear import of the statute and plainly contravenes the broad, remedial objectives Congress envisioned for enforcement of the ADEA.

ARGUMENT

I. THE COURT'S AUTHORITY TO PERMIT NOTICE IN AN ADEA SUIT DERIVES FROM THE STRUCTURE OF THE ADEA.

Congress designed the ADEA to combat discrimination against older persons as a class who were subjected to stereotypes and arbitrary policies and practices.[4] Since discrimination is, by definition, based on an individual's membership in a class, the ADEA provides for specific and broad remedial measures to redress wrongs and to grant relief on behalf of the class. This strong remedial thrust is the necessary starting point in any analysis of the authority of a federal court to supervise notice to affected class members in an ADEA suit.

Because the ADEA is a hybrid statute compiled from Title VII and the FLSA, its provisions must be construed to give full meaning to the meticulous structure crafted by Congress. The broad standing and relief provisions of the ADEA implicitly authorize notice as a means for implementing these provisions. Otherwise, the complex structure crafted by Congress would be virtually powerless.

This statutory authorization is strengthened by the ADEA's incorporation of § 16(b) of the FLSA, which explicitly grants individuals the right to bring suit on behalf of others similarly situated. This language embodies the means to enable individuals to exercise their statutory right. In addition, requiring individuals to consent under § 16(b) presupposes that they have knowledge of the suit in order to give their consent. Nothing in the language or legislative history of the FLSA diminishes the clear import of these provisions.

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[4] *See* Report of the Secretary of Labor, "The Older American Worker," reported in *Legislative History of the Age Discrimination in Employment Act* at 16.

A. The Provisions Of The ADEA Authorize Class Enforcement And Relief.

Like the FLSA and Title VII, the ADEA does not contain a provision expressly prohibiting or requiring notice in suits on behalf of similarly situated individuals. In other instances where the ADEA has been silent, this Court has looked to the structure of the statute to discern congressional intent. *Lorillard v. Pons*, 434 U.S. 575 (1978). In *Lorillard*, this Court held that although the ADEA did not contain a provision expressly granting a right to a jury trial, the ADEA's structure evidenced congressional intent to provide such a right. 434 U.S. at 585. In reaching this conclusion, the Court closely examined and relied on the remedial and procedural provisions of the ADEA.

The ADEA is a hybrid statute, containing prohibitions *in haec verba* to Title VII and incorporating certain procedural provisions of the FLSA, specifically § 16(b). *Lorillard v. Pons*, 434 U.S. at 584. Congress did more than merely borrow the most advantageous aspects of the FSLA and Title VII in designing the ADEA, however. Instead, Congress purposefully created remedial provisions broader than the FLSA or Title VII to ensure effective enforcement of the ADEA. Thus, in construing the ADEA, courts should interpret the ADEA's provisions as intricate parts of a finely-tuned machine that must work together to carry out Congress' objectives.

The procedural scheme of the ADEA is multi-faceted. In § 7(c) of the ADEA, Congress granted a broad statutory right to "any person aggrieved" to sue for legal or equitable relief. 29 U.S.C. § 626(c). Before the right to sue can be exercised, however, § 7(d) of the ADEA requires that a charge of discrimination be filed with the Equal Employment Opportunity Commission (EEOC) or a state agency, similar to that provided by Title VII. 29

U.S.C. § 626(d).[5] To carry out the right to sue, § 7(b) of the ADEA provides that the ADEA will be enforced in accordance with § 7(c) and with certain FLSA provisions,[6] specifically § 16(b).[7] Section 16(b) of the FLSA permits suit by employees on behalf of themselves and other "similarly situated" employees and requires similarly situated employees to file their consent with the court to become party plaintiffs once suit is filed. 29 U.S.C. § 216(b).[8]

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[5] The charge filing provision of the ADEA is not identical to Title VII, however. The ADEA permits simultaneous filing with a state agency and the EEOC, whereas Title VII requires complete deferral to the state agency. *Compare* 29 U.S.C. §§ 626(d) & 633 with 42 U.S.C. § 2000e-5(c); *compare also Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979) *with Mohasco Corp. v. Silver*, 447 U.S. 807 (1980).

[6] The legislative history of the ADEA reveals that Congress selected certain FLSA enforcement provisions for inclusion in the ADEA not for substantive reasons, but because Congress thought the Department of Labor was better staffed to enforce the statute, compared to the backlog and delays plaguing the enforcement of Title VII by the infant EEOC. 112 Cong. Rec. 20823 (1966); 113 Cong. Rec. 7076 (1967).

[7] Section 7(b) provides in pertinent part:

> The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended, *and subsection (c) of this section.*

29 U.S.C. § 626(b) (emphasis added).

[8] The pertinent language of § 16(b) provides:

> Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 216(b).

Given this meticulous structure, the starting point for determining the statutory authority for notice must be § 7(c) of the ADEA which defines the cause of action under the statute. Section 7(c) of the ADEA authorizes "any *person* aggrieved" the right to bring a civil action "for such legal or equitable relief as will effectuate the purposes of this Act." 29 U.S.C. § 626(c)(1) (emphasis added). The term "person" is broadly defined in § 11(a) of the ADEA to include "individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or *any organized groups of persons.*" 29 U.S.C. § 630(a) (emphasis added). Thus, the terms of the ADEA explicitly authorize collective and representative actions to enforce the substantive provisions of the Act.

Comparing the standing provision in ADEA § 7(c) with that of the FLSA in § 16(b) illustrates Congress' intention to establish a different and broader scheme for class enforcement under the ADEA.[9] As this Court has emphasized, Congress exhibited "a willingness to depart from the [FLSA] provisions regarded as undesirable or inappropriate for incorporation." *Lorillard v. Pons*, 434 U.S. at 581; *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126 (1985).

In sharp contrast to the ADEA's specific and all-encompassing grant of standing, the FLSA limits the

[9] Section 16(b) of the FLSA and § 7(b) of the ADEA also diverge in other areas, significantly on the availability of liquidated damages. Congress departed from the FLSA award of liquidated damages by limiting such damages under the ADEA to where the violation of the ADEA is willful. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125 (1985); *Lorillard*, 434 U.S. at 581. An award of liquidated damages was mandatory under the FLSA until § 11 of the Portal-to-Portal Act of 1947 made the award discretionary subject to a showing of good faith. 29 U.S.C. § 260. Since Congress did not incorporate § 11 of the Portal Act into the ADEA, a finding of willfulness compels the award of liquidated damages. *Thurston*, 469 U.S. at 128 n.22.

right to sue to "*employees*" in § 16(b)."[10] In addition, § 5 of the Portal-to-Portal Act of 1947 eliminated the right of labor organizations and legal representatives to bring "representative" actions under the FLSA. Pub. L. No. 80-49, § 5, 61 Stat. 84 (1947). The ADEA, however, explicitly grants these groups the right to bring representative actions under § 7(c).[11]

These striking differences in the standing provisions evidence that Congress sought to encourage collective and representative actions under the ADEA. A contrary interpretation would require that the incorporated terms of § 16(b) of the FLSA override the specific language of § 7(c) of the ADEA so as to deny standing to a whole host of persons such as applicants, labor organizations, associations, and other organized groups in ADEA actions. Clearly, this result defies the plain meaning of § 7(c) of the ADEA.

The ADEA's authorization of broad remedial relief further demonstrates the differences in the enforcement provisions Congress created for the ADEA. Sec-

[10] Even though the FLSA contains a definition of person similar to the ADEA, only employees have a right to sue under § 16(b). 29 U.S.C. § 203(a).

[11] The right of labor organizations and other interested groups to sue or intervene on behalf of their members under the ADEA and Title VII is well-settled. *See Martin v. Wilks*, 109 S. Ct. 2180 (1989) (NAACP under Title VII); *Independent Federation of Flight Attendants v. Zipes*, 57 U.S.L.W. 4872 (U.S. June 22, 1989) (Union under Title VII); *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274 (7th Cir. 1985) (not-for-profit corporation as plaintiff in ADEA action); *IBEW, Local 1439 v. Union Electric Co.*, 761 F.2d 1257, 1258 n.1 (8th Cir. 1985) (Union under ADEA); *Air Line Pilots Association v. Trans World Airlines, Inc.*, 713 F.2d 940 (2d Cir. 1983), *aff'd in part, rev'd on other grounds, sub nom. Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) (Union under ADEA); *AARP v. Farmers Group, Inc.*, 700 F. Supp. 1052 (C.D. Cal. 1988) (Association under ADEA).

tions 7(b) and (e) authorize ADEA plaintiffs to seek "legal and *equitable* relief" to "effectuate the purposes of the Act." 29 U.S.C. §§ 626(b) & (c) (emphasis added). In contrast, § 16(b) of the FLSA limits individual recovery to legal relief, as "the courts have consistently declared that injunctive relief was not available in suits by private individuals" under the FLSA. *Lorillard*, 434 U.S. at 581. In drafting the ADEA, Congress rejected this limitation in the FLSA.

By authorizing injunctive and legal relief under the ADEA, Congress confirmed its commitment to class-wide enforcement of the ADEA without the limitations of the FLSA. Injunctive actions serve a strong public interest in eradicating discriminatory employment practices. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975). The provision for equitable relief under the ADEA connotes class-wide remedies that benefit individuals other than the named plaintiff, an objective which only makes sense if the statute permits the means to achieve class enforcement.

Congress' deliberate exclusion of FLSA provisions that restrict class enforcement from the structure of the ADEA establishes that Congress intended to encourage, not discourage, collective and representative actions under the ADEA. Significantly, Congress declined to incorporate into the ADEA the FLSA statute of limitations contained in § 7 of the Portal-to-Portal Act.

The statute of limitations for individuals who opt into an FLSA private action runs until their consent is filed with the court by virtue of § 7 of the Portal Act. 29 U.S.C. § 256.[12] In contrast, the statute of limitations

[12] The initial versions of § 5 of the Portal Act amending § 16(b) included a limitations period within the provision. *See* 93 Cong. Rec. 2155 (1947), S. 70, § 8. This portion of § 5 was removed from the final act and contained in a wholly separate provision in § 7 of the Portal Act, which did not alter the language of § 16(b) of the FLSA. H.R. Conf. Rep. No. 326, 80th Cong., 1st Sess. 13 (1947).

for all ADEA actions is governed solely by § 6 of the Portal Act, as the ADEA specifically incorporates only §§ 6 and 10 of the Portal Act. 29 U.S.C. § 626(e)(1). *See Lorillard v. Pons*, 434 U.S. at 582 n.8. Thus, the ADEA does not require that each opt-in plaintiff satisfy the statute of limitations because the ADEA does not incorporate § 7 of the Portal Act.

By structuring the ADEA without § 7 of the Portal Act, Congress removed a significant procedural obstacle to class participation. As a result, once a complaint alleging class-wide discrimination under the ADEA is filed, the statute of limitations is tolled for all similarly situated individuals as it is under Title VII. *See Morelock v. NCR Corp.*, 586 F.2d 1096, 1103 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979); *Vivone v. Acme Markets, Inc.*, 687 F. Supp. 168 (E.D. Pa. 1988); *Levine v. Lane Bryant*, 700 F. Supp. 949 (N.D. Ill. 1988).[13]

Similarly, the charge filing provision in § 7(d) of the ADEA,[14] which is similar to Title VII[15] and has no

[13] The Eighth Circuit, which held that notice was prohibited in ADEA suits, also concluded that § 7 of the Portal Act was incorporated into the ADEA and required each opt in plaintiff to satisfy the statute of limitations. *O'Connell v. Champion International Corp.*, 812 F.2d 393 (8th Cir. 1987).

[14] Section 7(d) of the ADEA originally required that an individual not commence suit until the individual gave notice to the Secretary. Pub. L. No. 90-202, 81 Stat. 605. In 1978, Congress amended § 7(d) to eliminate this requirement by making the charge filing language passive to insure that any charge giving the employer notice of the challenged practice would satisfy the statute, regardless of who filed the charge. The amendments were designed to clearly permit "on behalf of" charges so that one charge could preserve the private right of action for any aggrieved individuals within the scope of the charge. Similarly, a person who had not filed the charge but was covered by it, could rely on it to satisfy § 7(d) and become a plaintiff.

[15] 42 U.S.C. § 2000e-5(c). Three times this Court has noted the similarities between the charge filing provisions of the ADEA

counterpart in the FLSA, eliminates another major obstacle to class enforcement. It is well settled under Title VII and the ADEA that so long as one charge is timely filed, any person within the class covered by the charge may rely on it to satisfy the administrative prerequisites of the statute in § 7(d).[16] The premise for this conclusion is that only one charge is necessary to put the employer and the EEOC on notice of the class-wide allegations. *Anderson v. Montgomery Ward & Co.*, 852 F.2d 1008, 1016 (7th Cir. 1988). Thus, the courts, as well as EEOC's regulations, do not require that each individual who files suit under the ADEA must have also filed a charge in order to comply with § 7(d). *Id; see* 48 Fed. Reg. 139 (January 3, 1983); 29 C.F.R. § 1626.3 (1983).

Implicit in Congress' meticulous design of the ADEA is the means for its implementation. Since notice provides an effective means of permitting class participation, prohibiting the courts from authorizing notice would contravene the clear import of the ADEA's provisions and objectives.

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and Title VII. *EEOC v. Commercial Office Products*, 486 U.S. 107, 108 S. Ct. 1666, 1675 (1988); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 395 n.11 (1982); *Oscar Mayer & Co.*, 441 U.S. at 755.

[16] As the Seventh Circuit emphasized in *Anderson v. Montgomery Ward & Co.*, 852 F.2d 1008, 1016 (7th Cir. 1988), "[w]e conclude, therefore, that Congress did not intend to require that every individual who files a suit under the ADEA also must have filed an individual charge." *Accord Lusardi v. Lechner*, 855 F.2d 1062, 1078 (3d Cir. 1988); *Kloos v. Carter-Day Co.*, 799 F.2d 397 (8th Cir. 1986). Every court of appeals to address the issue under Title VII has held that individuals who did not file a charge can rely on the timely charge of another in a class action or a multiple plaintiff joint action. *See, e.g., Snell v. Suffolk County*, 782 F.2d 1094 (2d Cir. 1986); *Jackson v. Seaboard Coast Line R.R. Co.*, 678 F.2d 992 (11th Cir. 1982); *Allen v. United States Steel Corp.*, 665 F.2d 689, 695 (5th Cir. 1982); *Foster v. Gueory*, 655 F.2d 1319, 1322-23 (D.C. Cir. 1981); *Allen v. Amalgamated Transit Union*, 554 F.2d 876 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977).

B. The Authority Of A Court To Permit Notice Is Implicit From The Incorporated Language Of Section 16(b) Of The FLSA.

In addition to the ADEA's own provisions, the language of the FLSA incorporated into the ADEA provides further support for a court's authority to permit notice in an ADEA suit. Since its inception in 1938, § 16(b) of the FLSA has provided for suit "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). Section 16(b) also originally permitted employees to designate agents or representatives to file suit on their behalf. Thus, the FLSA provided for collective and representative actions.

In 1947, Congress amended the FLSA by passing the Portal-to-Portal Act in order to stem a tidal wave of litigation triggered by a trilogy of Supreme Court decisions expanding the coverage of the FLSA.[17] Congress thought that the portal suits were unfounded, were orchestrated by unions with champertous desires,[18] and

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[17] S. Rep. No. 37, 80th Cong., 1st Sess. 10-11 (1947).

[18] One premise for the consent requirement was Congress' strong desire to stifle union activity. *See* 93 Cong. Rec. 1552-53 (1947) (remarks of Rep. Robsion); 93 Cong. Rec. 2162 (1947) (remarks of Sen. Hawkes); 93 Cong. Rec. 2325 (1947) (remarks of Sen. McGrath). The Congress of 1947 believed that the elimination of representative actions was "in accordance with good practice in the Federal courts." 93 Cong. Rec. 2366-67 (1947).

The desire to prevent groups such as unions to litigate on behalf of their members is clearly at odds with enforcement of the civil rights laws such as the ADEA. *See* note 11, *supra*. On many occasions, this Court has emphasized the importance of the right to petition the courts and the significant role that representative groups play in providing meaningful access to the courts. *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 585-86 (1971); *see Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981); *NAACP v. Button*, 371 U.S. 415 (1963).

were threatening the economic security of employers and the nation. *See* Pub. L. No. 80-49, § 1, 61 Stat. 84 (1947).

Given these concerns, Congress enacted a variety of amendments to restrict portal claims, one of which eliminated the provision for representative suits under the FLSA.[19] Section 5 of the Portal-to-Portal Act evolved from Congress' belief that many workers had not authorized their unions to sue on their behalf. Thus, Congress imposed a requirement that employees file written consents with the court in which the action is brought in order to become "party plaintiffs." Pub. L. No. 80-49, § 5, 61 Stat. 84 (1947).[20] Significantly, however, Congress retained the provision authorizing individuals to bring suit on behalf of others "similarly situated."

The controversy over the issue of notice under the ADEA arises primarily because of the ADEA's incorporation of § 16(b) of the FLSA, as amended by § 5 of the Portal Act to require individual consent.[21] Courts in-

[19] Congress seemed more preoccupied with limiting Portal-to-Portal actions by banning them altogether and imposing a statute of limitations where none had existed, in contrast to the minimal attention paid to representative actions. Indeed, the original bill that ultimately became law preserved the right to bring representative actions under § 16(b), until it was amended to address the Senate's concern with curbing union activities. *See* H.R. 2157, 93 Cong. Rec. 2366-67 (1947).

[20] Since the named plaintiffs identify themselves and clearly indicate their desire to pursue litigation through the filing of the complaint with the court, there is no need for them to file separate written consents to participate in representative actions. *See Anderson v. Montgomery Ward & Co.*, 852 F.2d 1008, 1018 (7th Cir. 1988) (and cases cited therein). Also, the language of § 16(b) appears to trigger the consent requirement only after suit has been brought, and not for those named in the complaint who initially bring suit.

[21] The courts have assumed, without much scrutiny, that the ADEA incorporated § 5 of the Portal Act. *See LaChappelle v. Owens-Illinois, Inc.*, 513 F.2d 286 (5th Cir. 1975). In enacting

terpreting § 16(b) have divided on their authority to issue notice in class actions under the FLSA because of the consent requirement.[22] The courts have also diverged in interpreting the ADEA based on the incorporated provisions of the FLSA.

The Third Circuit below[23] and the Seventh Circuit[24] interpret the similarity situated and consent language of

the ADEA, however, Congress specifically incorporated only §§ 6 and 10 of the Portal Act, 29 U.S.C. § 626(e)(1). This Court has interpreted the ADEA to exclude Portal Act provisions that were not explicitly included in the ADEA. *Lorillard*, 439 U.S. at 582 n.8. Moreover, the decisions fail to examine how the consent requirement relates to representative actions under ADEA § 7(c).

Finally, Congress intended that § 5 would have a limited application as § 5(b) of the Portal Act expressly confined its application to the FLSA, whereas other provisions of the Portal Act applied to the Walsh-Healy and Davis Bacon Acts as well as the FLSA. Pub. L. No. 80-49, §§ 1(a) & 5(b), 61 Stat. 84 (1947). Section 5(b) of the Portal Act provides:

> The amendment made by subsection (a) of this section shall be applicable only with respect to actions commenced under the Fair Labor Standards Act of 1938, as amended, on or after the date of the enactment of this Act.

Id.

[22] In *Braunstein v. Eastern Photographic Laboratories, Inc.*, 600 F.2d 335 (2d Cir. 1978), *cert. denied*, 441 U.S. 944 (1979), the Second Circuit concluded that the FLSA permitted notice. The Federal Circuit held that nothing in the FLSA prohibited the court from ordering the production of names and addresses in discovery for the purpose of facilitating notice. *United States v. Cook*, 795 F.2d 987, 991 (Fed. Cir. 1986). In contrast, the Eighth, Ninth and Tenth Circuits hold that the FLSA does not permit notice or discovery concerning potential class members for the purposes of notice. *Schmidt v. Fuller Brush Co.*, 527 F.2d 532, 536 (8th Cir. 1975); *Kinney Shoe Corp., v. Vorhes*, 564 F.2d 859, 863 (9th Cir. 1977); *Dolan v. Project Construction Corp.*, 725 F.2d 1263, 1267 (10th Cir. 1984).

[23] *Hoffmann-La Roche Inc. v. Sperling*, 862 F.2d 439 (3d Cir. 1988).

[24] *Woods v. New York Life Insurance Co.*, 686 F.2d 578, 580 (7th Cir. 1982).

§ 16(b) as encouraging class enforcement and permitting courts to facilitate notice in ADEA actions. The Eighth Circuit[25] takes a contrary view, reasoning that since the ADEA does not expressly authorize notice, the consent requirement in § 16(b) of the FLSA effectively limits enforcement of the ADEA.

The conclusion that notice is not permitted in an ADEA suit because of the consent requirement from § 5 of the Portal Act relies on faulty reasoning. First, this reasoning ignores the premise of *Lorillard* that statutory silence does not mean statutory prohibition of a right. 434 U.S. at 577. Rather, the key inquiry is whether the ADEA bars notice or whether notice is inconsistent with the structure of the statute. Clearly, the ADEA does not expressly bar notice. Moreover, the standing and remedial provisions of the ADEA authorize class-wide enforcement which implies the right to notice.

Second this reasoning disregards the express command of the ADEA that the statute be enforced in accordance with § 7(c) of the ADEA as well as § 16(b) of the FLSA. Determining the authority for notice based solely on the consent language of § 5 of the Portal Act effectively overrides the express provisions of the ADEA authorizing class standing and relief. Such a construction directly undermines the ADEA's purpose of attacking class-wide discrimination and leads to conflicting and inconsistent interpretations of provisions within the same statute.

Third, relying on the consent requirement ignores the "similarly situated" language that precedes it and was the foundation for § 16(b) when the FLSA was passed in 1938. Implicit in the right to sue on behalf of others

[25] *McKenna v. Champion International Corp.*, 747 F.2d 1211, 1213 (8th Cir. 1984) (ADEA case relying on earlier analysis in FLSA case *Schmidt v. Fuller Brush Co.*, 527 F.2d 532 (8th Cir. 1975)).

is the capacity to exercise that right. *Woods v. New York Life Insurance Co.*, 686 F.2d 578, 580 (7th Cir. 1982). As the Seventh Circuit reasoned in *Woods v. New York Life Insurance Co.*,

> [T]his authorization [in § 16(b)] surely must carry with it a right in the representative plaintiff to notify the people he would like to represent that he has brought suit, and a power in the district court to place appropriate conditions on the exercise of that right.

686 F.2d at 580. Without the right to notify others that they have common claims and injuries, the congressional authority to sue on their behalf is meaningless.

Neither a plain reading of § 16(b) nor the legislative history of the consent requirement suggest any lessening of the right of similarly situated individuals to bring collective actions. To the contrary, the legislative history of the consent provision reveals that Congress intended to preserve the right of employees to join together in collective litigation. 93 Cong. Rec. 2368 (1947). The Conference Report to the Portal Act emphasized:

> Collective actions brought by an employee or employees (a real party in interest) for and in behalf of himself or themselves and other employees similarly situated may continue to be brought in accordance with the existing provisions of the Act.

H.R. Conf. Rep. No. 326, 80th Cong., 1st Sess. 13 (1947); *see* S. Rep. No. 37, 80th Cong., 1st Sess. 48 (1947).

The legislative history of § 5 of the Portal Act makes clear that Congress intended to preserve collective actions under the FLSA. Nothing in the legislative history prohibits or rejects the concept of notice to similarly situated individuals. To the contrary, the inevitable corollary of consent is the capacity to exercise that obligation through notice. *Woods*, 686 F.2d at 580. When read to-

gether, the provisions of the ADEA and the FLSA grant similarly situated employees the means to exercise their rights together to enforce the statute.

C. Notice Is Critical To Enforcement Of The ADEA.

When a civil rights statute grants a plaintiff the right to seek injunctive relief, such as the ADEA provides, this Court has considered the plaintiff to be a " 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). Congress placed considerable authority in private individuals to enable them to carry out their role of vindicating policies of the highest national priority. *See Independent Federation of Flight Attendants v. Zipes*, 57 U.S.L.W. 4872 (U.S. June 22, 1989). Thus, guiding the court's discretion as to the scope and substance of notice to the class is the private litigant's role as a "private attorney general." *See Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 478 U.S. 546, 560 (1986); *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416 (1978); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401 (1968).

This congressional authorization limits a court's discretion in imposing restrictions on the individual's ability to exercise the rights Congress granted. Prohibiting plaintiffs from sending notice to other possible victims of the same discriminatory practice would cripple private enforcement of the ADEA, just as the inability to obtain attorneys' fees would cripple private enforcement of the civil rights laws.

In *Independent Federation of Flight Attendants v. Zipes*, 57 U.S.L.W. 4872 (U.S. June 22, 1989), the Court held that the discretion of the district courts is constrained by " 'the large objectives' of the relevant Act, . . . which embrace certain 'equitable considerations.' " *Id.* at 4874. Thus, although the statutory fee provision in Title VII does not specify any limits upon the district court's discretion, the Court has held that district courts should not deny fees unless special circumstances exist. *Id.* The Court reasoned:

> We thought this constraint on district court discretion necessary to carry out Congress' intention that individuals injured by racial discrimination act as " 'private attorney[s] general,' vindicating a policy that Congress considered of the highest priority."

Zipes, 57 U.S.L.W. at 4874 quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. at 402.

In ADEA actions, notice is an effective tool[28] that permits similarly situated individuals to join together in collective action to share the burdens and remove the obstacles of one individual bringing suit. Without the ability to notify other potential class members, class actions under the ADEA would die a quick death.

When read as a cohesive scheme to eradicate systemic discrimination, the provisions and structure of the ADEA demonstrate Congress' intent to provide for broad class enforcement. The means to implement this meticulous structure are integral to effectuating the purposes of the ADEA. Notice provides a significant means for fulfilling the ADEA's objectives.

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[28] Certainly, there are other methods of communicating with other victims of discrimination such as through the media, labor organizations, associations, etc. In many instances, however, these means are not available or the victims of an employment practice do not know who else has suffered from the same practice and do not have any other effective means of identifying them or reaching them.

II. THE PROVISION OF NOTICE IS CONSISTENT WITH THE COURT'S INHERENT AUTHORITY UNDER THE FEDERAL RULES TO MANAGE THE LITIGATION BEFORE IT.

Petitioner contends that the district court's actions constituted improper judicial sponsorship of plaintiffs' claims and improperly involved the court in unethical solicitation of prospective plaintiffs. In contrast, the facts show that the district court ensured that the notice was an objective means of providing information to potential victims of discrimination. The court specifically included a statement in the notice that it took no position on the validity of the claims or defenses raised by the parties. This procedure represents a balanced approach that considers the interests of the parties, the objectives of the ADEA, and the court's obligation to manage the litigation before it.

The Federal Rules of Civil Procedure vest the courts with considerable power and discretion to regulate the conduct of litigation. Fed. R. Civ. P. 1, 83. Conducting fair and efficient litigation extends to the issuance of notice. Supervising the issuance of notice to a class allows the court to control the content of the communication to ensure it provides objective, accurate and complete information. Such a procedure prevents misinformation from either party and avoids the need to issue corrective communications.[37] Notice also serves the interests of judicial management by facilitating the consolidation of common claims into one action and avoiding multiple suits.

The few courts that have prohibited the issuance of notice under the FLSA or ADEA emphasize the differences between Fed. R. Civ. P. 23 and the opt-in procedure in § 16(b). These courts rely, in part, on the mistaken premise that unless notice is mandatory because of due process concerns, the court has no authority to even oversee the issuance of notice. Based on this erroneous analysis, these courts conclude that Rule 23's opt-out provision and § 16(b)'s opt-in provision are irreconcilable.[38]

A closer examination of the attributes and consequences of class participation under the two provisions reveals more similarities than differences. The ADEA limits class-wide suits to similarly situated individuals, which means they essentially raise common claims, issues, and facts because they have been harmed by the same practice or policy over a specific time period. This is analogous to Rule 23's requirements of typicality and commonality of the claims and interests. In addition, since the opt-in plaintiff acknowledges interest in the litigation by giving his or her consent, any concern regarding the adequacy of representation is satisfied.

Even though the opt-in provision of the ADEA prevents class members from being bound without their consent, the practical consequences of an opt-in action and opt-out action are similar. The opt-in provision of the ADEA essentially has a preclusive effect, since employees rarely relitigate an issue on which others similarly situated have had their day in court.[39]

In terms of the liability at issue and the relief afforded under the ADEA and Title VII, which is governed by Rule

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[37] *See, e.g., Monroe v. United Air Lines, Inc.*, 90 F.R.D. 638, 640 (N.D. Ill. 1981); *Partlow v. Jewish Orphans' Home of Southern California, Inc.*, 645 F.2d 757 (9th Cir. 1981).

[38] These courts fail to consider that other courts have applied Rule 23 to ADEA class actions against the government. *See Moysey v. Andrus*, 481 F. Supp. 850 (D.D.C. 1979).

[39] *See* Foster, *Jurisdiction, Rights, and Remedies for Group Wrongs Under the Fair Labor Standards Act: Special Federal Questions*, 1975 Wisc. L. Rev. 295, 330-31 (1975).

23, there is little distinction between the opt-in and opt-out procedures. In a challenge to a class-wide practice or policy, the court adjudicates liability to the class regardless of the status of its members. Where the relief sought is injunctive, the class action devices have the same consequences. For example, where an injunction requires an employer to eliminate a discriminatory placement system, the injunction benefits all employees whether they opted in or not.[20] The opt-in and opt-out procedures diverge at the point of individual relief in a collective action governed by § 16(b) of the FLSA where only those individuals who consent are entitled to receive damages, whereas all employees in a Rule 23 action are entitled to damages unless they opt out.

Finally, under Rule 23(d), the federal courts have the authority to issue notice "for the protection of the members of the class or otherwise for the fair conduct of the action . . ." The premise for notice under Rule 23(d) parallels the reasons for notice in ADEA class actions. Given these similarities, Rule 23(d) provides an additional and appropriate source of authority for a court's supervision of notice. *See Oppenheimer Funds, Inc. v. Sanders*, 437 U.S. 340, 354 (1978).

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[20] *Compare Thurston*, 469 U.S. 111 (policy prohibiting pilots from bumping less senior flight engineers violated ADEA) *with Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976) (Under Title VII, ordering reinstatement of victims with full seniority).

CONCLUSION

AARP respectfully requests that the Court affirm the decision of the Third Circuit holding that courts have authority to permit plaintiffs to send notice in an ADEA action.

Respectfully submitted,

STEVEN S. ZALESNICK
CHRISTOPHER G. MACKARONIS
CATHY VENTRELL-MONSEES *
AMERICAN ASSOCIATION OF RETIRED PERSONS
1909 K Street, N.W.
Washington, D.C. 20049
(202) 662-4957
Attorneys for Amicus Curiae American Association of Retired Persons

* Counsel of Record

Date: July 7, 1989

AMICUS CURIAE

BRIEF

No. 88-1203

In the Supreme Court of the United States

OCTOBER TERM, 1989

HOFFMAN-LA ROCHE INC., PETITIONER

v.

RICHARD SPERLING, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE SUPPORTING RESPONDENTS

KENNETH W. STARR
Solicitor General

DAVID L. SHAPIRO
Deputy Solicitor General

STEPHEN L. NIGHTINGALE
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

CHARLES A. SHANOR
General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

VELLA M. FINK
Assistant General Counsel

GALE BARRON BLACK
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

QUESTION PRESENTED

Whether a district court has the authority, in a collective action brought under the Age Discrimination in Employment Act of 1967, to supervise the formulation and giving of notice of the action to employees on whose behalf it has been brought.

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INTEREST OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Under the Age Discrimination in Employment Act of 1967, an employee may bring a collective action for himself and other similarly situated employees, but those employees do not participate in the suit unless they file consents to become parties. 29 U.S.C. 626(b) (incorporating Section 16(b) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 216(b)). The question presented here is whether a district court has authority to supervise notice of the action to employees on whose behalf it has been brought. The Equal Employment Opportunity Commission has broad responsibility for the administration and enforcement of the ADEA. In particular, it is required to investigate charges by individuals alleging violations of the Act (29 U.S.C. 626(a)), and may bring actions seeking damages and injunctive relief on behalf of employees (29 U.S.C. 626(b), incorporating 29 U.S.C. 216(c), 217). Private actions, including

collective actions, are an important means of effectuating the national policy embodied in the ADEA and are, therefore, an important adjunct to the Commission's enforcement efforts. The resolution of the question presented by this case could have a substantial impact on the efficacy of private actions brought to remedy violations of the ADEA.

The EEOC is also responsible for enforcing the Equal Pay Act of 1963, 29 U.S.C. 206(d). Like the ADEA, the Equal Pay Act is enforced in part by the Commission and in part through private actions, including collective actions governed by Section 16(b) of the FLSA. Thus, the Commission also has a substantial interest in the effect that this case could have on private enforcement of the Equal Pay Act.[1]

STATEMENT

1. Section 4 of the ADEA, 29 U.S.C. 623, prohibits arbitrary employment discrimination on the basis of age. The remedies for a violation of the Act are defined in large part by reference to the Fair Labor Standards Act of 1938. Subject to qualifications not relevant here, Section 7(b) of the ADEA, 29 U.S.C. 626(b), provides that the Act "shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217" of Title 29 and Section 7(c) of the ADEA, 29 U.S.C. 626(c).

Section 16(b) of the FLSA, 29 U.S.C. 216(b), allows employees to initiate collective actions for themselves and other similarly situated employees. Under Section 7(c) of the ADEA, 29 U.S.C. 626(c), such an action may seek "such legal or equitable relief as will effectuate the purposes" of the Act. However, an employee on whose behalf a collective suit is brought is not bound by a judgment in the suit unless he files a

[1] The Department of Labor has responsibility for enforcing the minimum wage and overtime provisions of the FLSA. Private and governmental actions under that Act are also subject to Section 16(b). The United States is a potential defendant in actions governed by Section 16(b). It may therefore be affected by the decision in this case whenever its employees attempt to bring collective actions under that provision.

written consent to become a party. Section 16(b) provides, in pertinent part, that an action

> may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

2. On February 4, 1985, petitioner Hoffman-La Roche Inc. fired or demoted some 1200 workers pursuant to a reduction in force. Respondent Richard Sperling, a discharged employee, filed an age discrimination charge with the EEOC on behalf of himself and "all other HLR employees over the age of 40 similarly situated." Pet. Br. 3 n.2. With the assistance of counsel, Sperling and other employees organized a group known as Roche Age Discriminatees Asking Redress (R.A.D.A.R.). On March 7, 1985, they mailed a letter, on R.A.D.A.R. letterhead, to some 600 of petitioner's employees. The letter advised that an action would be brought against petitioner under the ADEA and invited the addressees to join the action by filling out and returning an enclosed "Consent to Join Action" form. Pet. App. 4a, 42a-49a.

Thereafter, respondents filed an action under the ADEA, New Jersey's Law Against Discrimination, N.J. Stat. Ann. §§ 10:5-1 *et seq.* (West 1976 & Supp. 1989), and New Jersey contract law. See Pet. App. 52a. In Count I of the complaint, respondents, individually and on behalf of all other persons similarly situated, alleged that the reduction in force had discriminated against the members of this class on the basis of age and sought, *inter alia*, injunctive relief, monetary damages, and reinstatement.

As a result of the March 7 letter and "informal networking," over 400 consents to participate in the action were filed. Respondents moved for discovery of the names and addresses of the similarly situated employees described in the complaint and for notice of the action from the court to those employees who

had not yet filed consents. Petitioner opposed those motions and filed a cross-motion, asking the court to invalidate the consents filed with the court and to direct "corrective notice" to the individuals who had filed them. Petitioner argued that R.A.D.A.R.'s March 7 letter was misleading or incomplete in various respects and that the resulting consents were invalid. Pet. App. 4a-5a, 54a, 80a-85a.

On respondents' motion, the district court held that it was "permissible for a court to facilitate notice of an ADEA suit to absent class members in appropriate cases, so long as the court avoids communicating to absent class members any encouragement to join the suit or any approval of the suit on its merits." Pet. App. 67a. Accordingly, the court ordered petitioner to comply with respondents' discovery request and authorized respondents to send a notice, which the court drafted and attached to its order, to those employees who had not yet filed consents. *Id.* at 70a-71a. The notice included a statement indicating that it had been "authorized by" the court, but the notice was to be signed and sent by respondents or their attorneys. *Id.* at 111a. The district court denied petitioner's cross-motion. *Id.* at 79a-85a.

The district court stayed the sending of the notice and certified for appellate review under 28 U.S.C. 1292(b) the issue whether it had "the authority to facilitate notice of the action to * * * persons who have not yet filed consents to join the action." Pet. App. 40a.[2]

3. The court of appeals granted leave to appeal and affirmed, holding that "there is no legal impediment to court-authorized notice in an appropriate case." Pet. App. 19a. The court first rejected petitioner's argument that the language and legislative history of Section 16(b) of the FLSA precluded such notice. Pet. App. 16a. Noting that the statute "expressly authorizes a plaintiff to bring the action on behalf of 'other

[2] Petitioner did not seek leave to take an appeal of the portion of the district court's order enforcing respondents' request for discovery of the identities of the class members. See Pet. App. 33a, 40a, 106a. Therefore, the propriety of that ruling is not before the Court.

employees similarly situated,' " the court of appeals found that "[w]ithout such notice, the statute's explicit approval and authorization of collective actions would be seriously undermined." *Ibid.* The court also concluded that "the silence of the legislative history on the question of notice to class members together with the continued congressional sanction for actions brought under the FLSA, and thereby the ADEA, on behalf of similarly situated persons must be taken to mean that Congress has imposed no bar to court-authorized notice." *Id.* at 18a. Finally, the court found that there was no reason to impose such a bar "as a policy matter" and cited several benefits that would result from court supervision of notice. *Id.* at 18a-19a.[3]

SUMMARY OF ARGUMENT

Collective actions are an important means of enforcing the ADEA's prohibition on age discrimination, but also present some of the same potential abuses as class actions brought under Fed. R. Civ. P. 23. Consequently, courts have a "duty and * * * broad authority" to exercise control over collective actions and the conduct of counsel and the parties. Cf. *Gulf Oil Co.* v. *Bernard*, 452 U.S. 89, 100 (1981). That authority extends to the supervision of notice to employees of the pendency of a collective action brought on their behalf. Court supervision over notice can serve the legitimate purpose of assuring that absentees receive timely and evenhanded information on the

[3] The court of appeals noted that "it is * * * within the discretion of the district court whether and how to implement such notice," and did not reach the issue of whether the district court's approval of the form of the proposed notice in this case was an abuse of discretion. Pet. App. 19a-20a.

As the court of appeals recognized, there is a conflict among the circuits on the question presented by this case. Compare *Braunstein* v. *Eastern Photographic Labs, Inc.*, 600 F.2d 335 (2d Cir. 1978), cert. denied, 441 U.S. 944 (1979); *Woods* v. *New York Life Insurance Co.*, 686 F.2d 578 (7th Cir. 1982); *United States* v. *Cook*, 795 F.2d 987, 993 (Fed. Cir. 1986), with *McKenna* v. *Champion International Corp.*, 747 F.2d 1211 (8th Cir. 1984); *Dolan* v. *Project Construction Corp.*, 725 F.2d 1263, 1267-1269 (10th Cir. 1984); *Partlow* v. *Jewish Orphans' Home, Inc.*, 645 F.2d 757 (9th Cir. 1981); *Kinney Shoe Corp.* v. *Vorhes*, 564 F.2d 859, 864 (9th Cir. 1977).

action. It can also avoid wasteful after-the-fact disputes over the propriety of notice and the validity of consents, and can facilitate judicial management of these often complex cases.

1. Fed. R. Civ. P. 83 states that "[i]n all cases not provided for by rule," district courts have authority to "regulate their practice in any manner not inconsistent with" federal or local rules. Rule 83, and the tradition it reflects, provide ample authority for the action under review in this case, since the rule allows courts to fashion procedures for situations, like notice of collective actions, that are integral to the effective management of litigation. The view that courts have residual authority under Rule 83 to supervise the formulation and giving of notice of collective actions finds further support in the history of Rule 23(d), which has been viewed as a codification of the courts' inherent authority over notice in representative actions.

2. The structure and legislative history of the ADEA and the FLSA do not detract from the court's authority to supervise notice to absent employees of a collective action filed on their behalf. Congress has created a remedy that envisages some form of notice, but has otherwise been silent on the court's role. The structure of the Act does not foreclose court oversight of notice, and cases that address the question of when a right of action, or an additional remedy, may be implied for breach of a statutory duty are inapposite to the issue of the court's role in administering the express collective remedy incorporated in the ADEA. Similarly, though some of the modifications to the FLSA that Congress enacted in 1947 have been incorporated into the ADEA, the history of those amendments provides no support for the proposition that Congress intended courts to take a grudging approach to that remedy as it has been preserved and extended to ADEA cases.

3. When they supervise notice to employees, courts must avoid communicating approval of the merits of the action or encouraging participation. When courts maintain that neutrality, their supervision of notice—with a view to the legitimate interests of the parties, absentees, and the court—cannot be

characterized as improper solicitation of claims. The question of judicial authority presented by this case should not be decided on the basis of dubious assumptions about the merits of claims that may be advanced in response to court-authorized notice or about the procedural consequences of permitting employees to exercise the rights Congress gave them.

ARGUMENT

THE DISTRICT COURT HAS AUTHORITY TO SUPERVISE NOTICE TO EMPLOYEES ON WHOSE BEHALF A COLLECTIVE ACTION HAS BEEN BROUGHT UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

A. Introduction

Through its incorporation of Section 16(b) of the FLSA, the ADEA expressly authorizes employees to bring collective actions "in behalf of * * * themselves and other employees similarly situated," but also provides that each employee who wishes to participate in such an action must file a written consent. This form of action offers significant potential benefits to employees seeking relief for unlawful age discrimination. Each employee need not prepare a complaint and litigate his own individual action. Claims that alone would not justify a suit against an employer may be aggregated and pursued in a single action. Moreover, when employees claim injury from a single discriminatory practice, issues of law and fact common to the claims of many employees may be efficiently resolved in a single action.[4] All these benefits, however, are dependent on employees' obtaining timely notice of the pendency of an action brought on their behalf, so that they can intelligently determine whether to participate.

Thus, collective actions facilitate enforcement of the ADEA. But they also raise problems of administration for courts. Any

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[4] "The evident purpose [of Section 16(b)] is to provide one law suit in which the claims of different employees, different in amount but all arising out of the same character of employment, can be presented and adjudicated, regardless of the fact that they are separate and independent of each other." *Shain* v. *Armour & Co.*, 40 F. Supp. 488, 489 (W.D. Ky. 1941).

employee may commence a collective action simply by filing a complaint and alleging that he is proceeding for himself and other similarly situated employees. Since such actions are not brought under Fed. R. Civ. P. 23,[5] a named plaintiff is not required to demonstrate at an early stage of the action that claims asserted on behalf of other employees are suitable for class treatment and that he and his counsel are qualified to pursue them. Nor are those other employees entitled to participate in the action unless they file individual consents. In this context, if the other employees on whose behalf the action is brought receive no notice at all, they are deprived entirely of the opportunity to participate in an action that Congress authorized in order to facilitate vindication of rights created by the Act. If they receive inaccurate information, they may be induced to avoid a suit that might have been a vehicle for redressing unlawful age discrimination—or to enter a suit that does not

[5] Rule 23 of the Federal Rules of Civil Procedure applies to all civil actions in federal court "[i]n the absence of a direct expression by Congress of its intent to depart from the usual course of trying 'all suits of a civil nature' under the Rules established for that purpose." *Califano* v. *Yamasaki*, 442 U.S. 682, 700 (1979). In the legislative history of the Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 87, which gave Section 16(b) its present form, there was a suggestion that employees could bring either a collective action in accordance with the Act or a class action under the version of Rule 23 then in effect. H.R. Conf. Rep. No. 326, 80th Cong., 1st Sess. 14 (1947). However, the drafters of the 1966 amendment to Rule 23 stated that "[t]he present provisions of 29 U.S.C. 216(b) are not intended to be affected by Rule 23, as amended," Advisory Committee note to Rule 23, 28 U.S.C. App. at 563, and many courts have held that because Section 16(b) requires employees to file written consents to join a collective action, Rule 23 (or at least the provision of Rule 23(b)(3) for "opt-out" damage actions on behalf of a class) does not apply to suits brought under Section 16(b), see *LaChapelle* v. *Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975); 3B J. Moore, *Moore's Federal Practice*, ¶ 23.02[2.-10] (2d ed. 1989). In any event, this case was not brought or certified as a class action under Rule 23, and therefore the provisions of Rule 23 that authorize notice to class members are not applicable by their terms.

Though Rule 23 does not expressly authorize notice in collective actions under the ADEA, it clearly does not prohibit such notice, expressly or by implication. Cf. *Colgrove* v. *Battin*, 413 U.S. 149, 164 (1973). As discussed below, courts may draw on Rule 23, by analogy or as a source of judicial experience, in addressing issues of notice that arise in collective actions.

provide an appropriate vehicle for the efficient resolution of their claims.

This case presents the narrow question whether in these circumstances district courts have authority to play any role in the formulation and giving of notice to employees of a collective action that has been brought on their behalf. While petitioner concedes that the named plaintiffs in a collective action may communicate with other employees and solicit consents (Pet. Br. 46; see *id.* at 4 n.3, 32 n.40), it contends that a district court has "no authority under any statute or rule" (*id.* at 5) to pass on any such communication in advance. Rather, petitioner maintains, the court's *only* authority is "to review, upon motion by a party to the suit, the propriety of the consents which have been filed as a result of the solicitation process" (*id.* at 46).

In support of this cramped conception of the courts' authority in ADEA actions, petitioner argues primarily that the language, structure, and history of the ADEA and the FLSA manifest an intention on Congress's part to foreclose any judicial oversight of notice. Pet. Br. 13-35. While we believe that this argument is mistaken even on its own terms, its focus is seriously misplaced. Both the FLSA and the ADEA are silent on the authority of courts to supervise notice of the action. In keeping with its usual practice, Congress has prescribed only the basic features of the collective action remedy—allowing suits on behalf of "similarly situated" employees and requiring written consents—while leaving the many other procedural issues that might arise to be resolved by reference to such other sources of law as the Federal Rules of Civil Procedure.[6]

No Federal Rule of Civil Procedure speaks specifically to the question of notice in collective actions governed by Section

[6] Rather than legislating procedures for each right of action it creates, Congress has authorized this Court to "prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts • • • in civil actions" (28 U.S.C. 2072). In this way, it has provided a general framework that applies to the many rights of action it has established.

16(b) of the FLSA. But the last sentence of Rule 83 recognizes the broad residual authority of the district courts to "regulate their practice" in a manner not inconsistent with federal and local rules:

> In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

As we demonstrate further below, this provision embodies the substantial authority courts must possess in order effectively to manage litigation on their dockets. More particularly, in light of the legitimate interests that courts, parties, and absent employees have in notice of collective actions, the rule vests courts with ample authority to supervise such notice. Nothing in the language or history of the FLSA and the ADEA detracts from that authority. And as long as courts avoid communicating any encouragement to join an action and take no position on the merits of the case, judicial participation in notice of collective actions cannot be rejected as the equivalent of improper judicial solicitation of claims.

B. Rule 83 of the Federal Rules of Civil Procedure Confers Authority on District Courts to Supervise Notice of Collective Actions Under the ADEA

1. In *Gulf Oil Co.* v. *Bernard*, 452 U.S. 89, 101 (1981), the Court held that, in the absence of clear justification, a federal district court erred in entering an order that effectively prohibited communications between the named plaintiffs and other class members in a Rule 23 class action. At the same time, the Court acknowledged the substantial interest that courts have in such communications, saying (*id.* at 99-100 (footnotes omitted)):

> Class actions serve an important function in our system of civil justice. They present, however, opportunities for abuse as well as problems for courts and counsel in the management of cases. Because of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and the parties.

The same is true of collective actions under the ADEA. These actions similarly serve "an important function" in the enforcement of the prohibition against age discrimination. But they also present "opportunities for abuse as well as problems for courts and counsel in the management of cases." Under the reasoning of *Gulf Oil*, therefore, courts in which a collective action has been filed have at least as compelling a "duty" and "broad authority" to exercise control over the conduct of the parties to a collective action as the Court recognized in *Gulf Oil*.

2. Court supervision of notice that takes account of the legitimate interests of the parties, the similarly situated employees on whose behalf an action has been brought, and the court itself can be an important aspect of judicial management of a collective action. By overseeing the content and delivery of the notice, the district court can assure that it is timely, accurate, and informative.[7] Absent employees have a clear interest in receiving such notice about their statutory right to join the suit, so that they can determine whether they have a potential claim and how best to protect that claim. See *Monroe* v. *United Air Lines, Inc.*, 90 F.R.D. 638, 640 (N.D. Ill. 1981).[8] Moreover, the parties and the court benefit by resolving disputes about the proper content of the notice before it is mailed. It makes little sense to suggest, as petitioner does (Pet. Br. 46 & n.58), that a district court cannot supervise the contents of a notice in ad-

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[7] Cf. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356, 398-399 (1967) ("court-controlled notice is an alternative to private activities that can be quite unpalatable").

[8] Although due process does not require notice to employees on whose behalf a collective action is brought, those employees nevertheless have a significant interest in learning of the action. It may be impractical for them to pursue an action on their own behalf, and in any event the *stare decisis* effect of a judgment in a collective suit may effectively foreclose a separate action. See Spahn, *Resurrecting the Spurious Class: Opting-In to the Age Discrimination in Employment Act and the Equal Pay Act through the Fair Labor Standards Act*, 71 Geo. L.J. 119, 141 (1982).

vance, but can (and indeed must) invalidate written consents and send corrective notice after the fact if employees receive misinformation.

The court may also properly rely on notice to facilitate its management of the case. In order to establish a plan for discovery, various types of motions, and other aspects of trial preparation, the court must know the dimensions of the action at a relatively early stage. A court may fairly couple a deadline for filing consents to join a collective action with a notice that advises absentees of their options and of the deadline for action.[9] The alternative, in which courts must wait passively for employees to opt into an action and then resolve disputes as to whether they can be allowed to join, would frustrate effective management of these often complex cases. See Pet. App. 19a; *Braunstein* v. *Eastern Photographic Labs, Inc.*, 600 F.2d 335, 336 (2d Cir. 1978), cert. denied, 441 U.S. 944 (1979).

These compelling reasons for judicial authority over notice are not exhaustive. On the one hand, particular cases may present additional circumstances justifying notice. On the other hand, court supervision is not necessarily called for in every collective action. The nature of the court's involvement—which might include prescribing some or all of the terms of a notice, reviewing notices submitted to it for advance approval, and resolving disputes about notice already sent—also may vary from case to case. The issue here, however, is whether courts have any power to act with respect to notice before it has been

[9] Fed. R. Civ. P. 16(b) now requires entry of a scheduling order that limits the period within which various pretrial steps must be taken, including the time available "to join other parties and to amend the pleadings." Moreover, subparagraphs (c)(10), (c)(11), and (e) of the Rule authorize the court to enter a pretrial order with provisions addressing "the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex questions, multiple parties, difficult legal questions, or unusual proof problems" and "such other matters as may aid in the disposition of the action." These provisions underscore the interest that district courts have in defining the scope of a collective action in an orderly fashion and therefore inform the issue of authority presented by this case.

sent. If courts are to discharge their "duty" to administer actions of this type, that power must exist.[10]

3. Rule 83 recognizes the authority that courts must have in order to perform their appropriate role in collective actions. In any case "not provided for by rule," it empowers district courts to "regulate their practice in any manner not inconsistent with" federal or local rules. In *Gulf Oil*, though this Court found that Rule 23(d) authorized oversight of class actions, it also noted that "Rule 83 provides a more general authorization to district courts" to regulate the actions of the parties to a class suit. 452 U.S. at 99 n.10. Similarly, in *Woods* v. *New York Life Insurance Co.*, 686 F.2d 578, 580 (1982), the Seventh Circuit noted the applicability of that provision to notice of ADEA actions, saying, "[w]e cannot find any express basis in rule or statute for inferring * * * the power of the district court to regulate the content and distribution of the notice to potential class members; but we think * * * the power may fairly be inferred from Section 16(b) itself and from Rule 83."[11]

[10] The First Amendment may well place some limits on the nature of the supervision that district courts may exercise over communications between named plaintiffs or their attorneys and absentees. However, it clearly does not exclude all authority to supervise the formulating and giving of notice, especially (as here) on motion of the plaintiff. Thus, we agree with petitioner that the Court need not determine the applicability of the First Amendment to decide the issue presented by this case. See Pet. Br. 44.

[11] In *Pan American World Airways, Inc.* v. *United States District Court*, 523 F.2d 1073 (1975), the Ninth Circuit held that a district court did not have authority under any applicable statute or rule to provide notice to the next of kin of victims of two airline crashes that actions arising from the crashes were pending. The court of appeals found that Rule 83 was unavailable because "notification from the court to potential plaintiffs is not authorized by any [local] rule * * * and a procedure that deviates so sharply from the traditional role of the judiciary cannot be justified as an ad hoc rule of practice." *Id.* at 1078. *Pan American* is fully consistent with the result below. The order overturned in *Pan American* contemplated notice to persons who were not in any sense before the court, apparently in order to encourage them to file suit in the same court. By contrast, in this case, notice would be sent to persons on whose behalf an action had been brought, in order to inform them of that action and to implement a remedy that Congress provided for their benefit.

This interpretation of Rule 83 is consistent not only with the language of the Rule, but also with the tradition behind it and with its place in the Rules' overall scheme. Courts have always exercised broad authority "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link* v. *Wabash R.R.*, 370 U.S. 626, 630-631 (1962).[12] Obviously, the Rules cannot specifically address all situations that might call for judicial action to assure "orderly and expeditious disposition." Consequently, they settle many aspects of district court procedure, and then preserve residual authority for situations not specifically treated.[13]

[12] In *Link*, the Court found that a district court had authority to dismiss an action *sua sponte* for failure to prosecute. It rejected both the claim that such a dismissal was inconsistent with Rule 41(b) (which allows for such a dismissal on motion of a party) and, with a reference to Rule 83, the contention that the district court could not act in the absence of a local rule authorizing dismissal. 370 U.S. at 630-631, 633 n.8.

Similarly, in *Ex parte Peterson*, 253 U.S. 300, 312 (1920), the Court upheld the district court's authority to appoint an "auditor" to assist with complex computations on the ground that "[c]ourts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties." As in *Peterson*, the issue here of the court's power to supervise notice arises "in the absence of legislation to the contrary." Indeed, Rule 83, which was adopted in accordance with a grant of rulemaking authority to this Court, applies by its terms. There is thus no occasion to consider the scope of inherent powers that are "shielded from direct democratic controls." *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 764-765 (1980).

[13] Cf. *United States* v. *New York Telephone Co.*, 434 U.S. 159, 170 (1977) (finding that former Fed. R. Crim. P. 57(b), once the counterpart to Rule 83 in the Criminal Rules, supported court's authority to order installation of pen register); *Miner* v. *Atlass*, 363 U.S. 641, 647 (1960); *id.* at 654-655 (Brennan, J., dissenting); *Luce* v. *United States*, 469 U.S. 38, 41 n.4 (1984).

Lower court decisions applying Rule 83 illustrate its scope and its limits. In *Republic International Corp.* v. *Amco Engineers, Inc.*, 516 F.2d 161 (9th Cir. 1975), the court relied on Rule 83 in prescribing the means of making service on a foreign government prior to the enactment of the Foreign Sovereign Immunities Act; at that point, the issue was not addressed by any statute or rule. By contrast, in *Brown* v. *Cameron-Brown Co.*, 652 F.2d 375 (1981), the Fourth Circuit held that a district court could not invoke the rule to dismiss a case as frivolous. The court explained that Rules 12 and 56 comprehensively governed pretrial dismissals and thus that Rule 83 was not available "as an additional source of authority for summary disposition of a frivolous lawsuit." *Id.* at 379. See *Franquez* v. *United States*, 604 F.2d 1239, 1244-1245 (9th Cir. 1979). See also, *e.g.*, *Heileman Brewing Co.* v. *Joseph Oat Corp.*, 871 F.2d 648, 651-652 (7th Cir. 1989) (recognizing inherent authority that "forms the basis for continued development of procedural techniques"); *HMG Property Investors, Inc.* v. *Parque Industrial Rio Canas*, 847 F.2d 908, 915-916 (1st Cir. 1988).

In determining how to exercise that authority, courts may employ the analysis that this Court outlined in *Harris* v. *Nelson*, 394 U.S. 286 (1969). In *Harris*, a prisoner sought to use interrogatories for purposes of discovery in a habeas corpus action. The Court found that Fed. R. Civ. P. 33 was inapplicable to habeas corpus proceedings and that the relevant statutes were silent on the availability of such discovery. Invoking the authority of the All Writs Act, 28 U.S.C. 1651(a), the Court continued (394 U.S. at 299):

> Clearly, * * * the habeas corpus jurisdiction and the duty to exercise it being present, the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage.

Similarly, in the ADEA Congress has created a remedy that contemplates that an action will be initiated by named plaintiffs and that other similarly situated employees will be given an opportunity to participate. Though some notice to employees is obviously necessary, the statute and rules are silent on the role courts may play in that notice. Rule 83 authorizes courts to "fashion appropriate modes of procedure" for that situation.

4. When courts undertake that task, Rule 23 is a logical source of "analogy" and "judicial usage," for at least two reasons:

First, the history of Rule 23 supports the view that courts have traditionally had authority to direct notice to absentees in actions similar to collective actions under the ADEA. Before 1966, Rule 23(a)(3) provided for class actions in cases in which "the character of the right sought to be enforced for or against the class [was] * * * several, and there [was] a common question of law or fact affecting the several rights and a common relief

was sought." In these actions, like collective actions under the ADEA and FLSA, members of the class could not participate in the action unless they opted into the lawsuit.[14] As petitioner points out (Pet. Br. 26 n.29), the pre-1966 version of Rule 23 expressly provided for notice to class members only in limited circumstances—in the event of a proposed dismissal or compromise—and even in that case notice was thought to be optional in an action under former Rule 23(a)(3).

In 1966, the drafters proposed a substantial modification of the rule. One aspect of the proposal, Rule 23(d)(2), provided that courts could require, "for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct" of such matters as "the opportunity of [class] members * * * to intervene and present claims or defenses, or otherwise to come into the action." Significantly, this proposal was not described or regarded as an extension of the authority courts already possessed. Marshalling a number of cases in which notice had been sent under the pre-1966 version of Rule 23, the Advisory Committee's note said that such notice was "not a novel conception" and added that the proposed Rule would "call[] attention to [notice's] availability and invoke[] the court's discretion."[15] Consistent with the tenor of the Advisory Committee's explanation of Rule 23(d), it has been described as "a general statement of the equitable powers that federal courts had even prior to the

[14] When describing collective actions brought under the FLSA, courts sometimes referred to them as spurious class actions. See, *e.g.*, *Pentland* v. *Dravo Corp.*, 152 F.2d 851, 853 (3d Cir. 1945).

[15] 28 U.S.C. App. at 565. With respect to prior cases in which notice had been authorized by a court, the note stated (*ibid.*):

> For example, in "limited fund" cases, members of the class have been notified to present individual claims after the basic class decision. Notice has gone to members of a class so that they might express any opposition to the representation, see *United States* v. *American Optical Co.*, 97 F. Supp. 66 (N.D. Ill. 1951) * * *; cf. *Weeks* v. *Bareco Oil Co.*, 125 F.2d 84, 94 (7th Cir. 1941), and notice may encourage interventions to improve the representation of the class. Cf. *Oppenheimer* v. *F.J. Young & Co.*, 144 F.2d 387 (2d Cir. 1944). Notice has been used to poll members on a

addition of the subdivision as part of the 1966 amendment of Rule 23." C. Wright, A. Miller, & M. Kane, *Federal Practice & Procedure* § 1793, at 294 (2d ed. 1986).[16] The authority that was codified in Rule 23(d)(2) remains available for collective actions under the ADEA.

Second, in "fashioning modes of procedure" for collective actions under the ADEA, courts may properly draw on their experience with the notice expressly authorized by Rule 23. In class actions, courts have used notice not just to provide the basis for a binding judgment, but also for a variety of reasons related to the determination whether a class action should be certified, to the protection of class members, and to the management of class actions. See C. Wright, A. Miller, & M. Kane, *Federal Practice & Procedure* § 1793, at 309-313 (1986). Particularly relevant here are cases in which courts have directed notice to putative class members in order to advise them that a motion for class certification has been denied and to inform them of the availability of intervention for the pursuit of in-

> proposed modification of a consent decree. See record in *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961).

See also, *e.g.*, *Dickinson* v. *Burnham*, 197 F.2d 973, 975-976 (2d Cir.), cert. denied, 344 U.S. 875 (1952) (notice to class members of judgment in favor of class representatives in order to enable them to intervene); *Women's Catholic Order of Foresters* v. *City of Ennis*, 112 F.2d 270 (5th Cir. 1941) (describing class suit commenced before the effective date of the Civil Rules in which notice was given to members of the class).

[16] Accord Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 316 (1972) (Rule 23(d) "merely codifies the inherent judicial power to give notice to absent parties whenever the court deems it advisable to do so").

In a related context, Rule 19(c) provides that a pleading shall state the names of any "necessary parties" who have not been joined, if known to the party filing the pleading, and the reasons why they have not been joined. The Advisory Committee explained that "[i]n some situations it may be desirable to advise a person who has not been joined of the fact that the action is pending, and in particular cases the court in its discretion may itself convey this information by directing a letter or other informal notice to the absentee." Advisory Committee note to Fed. R. Civ. P. 19 (1966 Amendment), 28 U.S.C. App. at 556. The Advisory Committee apparently assumed that courts have authority to provide such notice notwithstanding the absence of a rule expressly authorizing it.

dividual claims.[17] Those cases establish that supervision of notice to employees in ADEA collective actions would be "in conformity with judicial usage." *Harris* v. *Nelson*, 394 U.S. at 299.

5. In sum, the concerns cited in *Gulf Oil*, when this Court sustained the power and duty of district courts to supervise the actions of parties to Rule 23 class actions, are fully applicable here. Rule 83, the embodiment of the broad authority that courts have traditionally exercised to manage litigation on their dockets, provides an ample mandate for that supervision.

Significantly, petitioner does not argue that courts have *no* authority to supervise notice to class members. To the contrary, petitioner filed a motion in the district court that asked the court to review R.A.D.A.R.'s prior solicitation of consents, to invalidate consents that had been filed, and to direct "corrective notice" to employees who had filed consents. See Pet. App. 54a, 79a-85a. In this Court, it apparently adheres to its view that consents may be invalidated (and notice directed) on the basis of incomplete or misleading communications with employees. Pet. Br. 46. It is untenable to suggest that the power to oversee notice is limited to damage control after the fact. If a named plaintiff seeks a ruling from the court on the propriety of a proposed communication to employees on whose behalf a suit has been brought—in effect, a declaratory judgment that the communication is appropriate—the court should not be required to remain silent until its time and resources, and those of the parties, must be spent in hearing attacks on prior solicitations and in fashioning corrective measures.

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[17] *Miller* v. *Chinchilla Group, Inc.*, 66 F.R.D. 411, 417 (S.D. Iowa 1975); *Rothman* v. *Gould*, 52 F.R.D. 494 (S.D.N.Y. 1971). See also *Payne* v. *Travenol Laboratories, Inc.*, 673 F.2d 798, 812 & n.15 (5th Cir. 1982). Cf. *Avery* v. *Secretary of HHS*, 762 F.2d 158, 164-165 (1st Cir. 1985) (notice to potential class members for the purpose of determining whether they are within the group entitled to relief).

C. Court Supervision of Notice is Consistent With Section 16(b) of the Fair Labor Standards Act and the Age Discrimination in Employment Act

Petitioner's principal argument is that the language, structure, and history of the ADEA and of the provisions it incorporated from the FLSA foreclose any advance judicial role in notice of ADEA actions. That argument is flawed on several levels.

1. Most fundamentally, the argument misconceives the relevance of the statutes to the question presented by this case. The statutes giving employees the right to initiate and join collective actions to recover ADEA liabilities are relevant not because they themselves specifically authorize judicial supervision of notice. Rather, they establish a national policy against age discrimination that is enforceable through private suits by named plaintiffs on behalf of other employees. Since that remedy is ineffective unless employees are notified that a collective action has been filed, the statute provides the occasion for the exercise of the courts' power to oversee that aspect of the litigation. See *Woods*, 686 F.2d at 580-581.

2. Petitioner also attributes far too much meaning to Congress's silence on the issue of notice in FLSA and ADEA actions. "Ordinarily, 'Congress' silence is just that—silence." *Community for Creative Non-Violence* v. *Reid*, No. 88-293 (June 5, 1989), slip op. 17 (quoting *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 686 (1987)). The Court "has frequently cautioned that '[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.' " *NLRB* v. *Plasterers' Union*, 404 U.S. 116, 129-130 (1971) (quoting *Girouard* v. *United States*, 328 U.S. 61, 69 (1946)). In this case, congressional silence relates to a matter on which Congress does not customarily speak—the management of litigation. Thus, the absence of express authority for court supervision of notice in the ADEA cannot be taken as a directive that courts are to have no such role.

Petitioner's discussion of the ADEA and the FLSA has two principal themes: first, that Congress has provided "comprehen-

sive enforcement schemes for both FLSA and ADEA cases" that exclude any court oversight of notice (Pet. Br. 13-18) and, second, that such oversight would violate Congress's intention to provide relief to employers from multi-party actions (*id.* at 20-30). Neither contention has merit.

a. In a growing number of cases, this Court has considered whether courts may recognize an implied private right of action, or a remedy in addition to those created by a statute, for breach of a statutory duty.[18] *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77 (1981), on which petitioner principally relies (Pet. Br. 14-18), was one such case. It held that employers do not have an implied right of action to recover contribution from labor unions in actions brought under Title VII. The question in *Northwest Airlines*, and the decisions on which it relied, was whether "a federal statute that does not expressly provide for a particular *private right of action* nonetheless implicitly created that right." 451 U.S. at 91 (emphasis added). Court supervision of notice is not a "right of action" to which this analysis applies—*i.e.*, a right to seek relief from a party on the basis of an alleged breach of a statutory duty. Nor is it a remedy for such a breach. It is an aspect of the procedure by which a statutory right of action is heard and a statutory remedy afforded.

Thus, the holding of *Northwest Airlines* is inapplicable here. And so is the basis for the Court's decision. In *Northwest Airlines*, Congress's provision of express rights of action for specified liabilities in favor of certain types of parties could properly be viewed as manifesting an intention to foreclose actions against other types of parties for different liabilities. Here, by contrast, the relevant statutes reflect no effort to enact a comprehensive scheme for the judicial management of collective actions. To the contrary, Congress created the right of action, specified the remedies, and left those remedies to be implemented and enforced in accordance with procedures applicable generally to civil cases.

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[18] *E.g.*, *Cort* v. *Ash*, 422 U.S. 66 (1975); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979); *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979).

b. Because the statutes are silent on the role of courts in giving notice of collective actions, their legislative history is of limited relevance. While such history can be helpful in clarifying the meaning of a statutory provision that is ambiguous on its face, it cannot properly be employed to settle an issue on which Congress has not legislated at all. Moreover, the legislative history of the FLSA and the ADEA add little to the text of the statutes themselves.

In 1938, Congress gave employees the right to bring collective actions as one way of enforcing their statutory entitlement to minimum wages and overtime pay. In addition, employees were allowed to authorize "representative actions" to recover amounts due under the Act—*i.e.*, to "designate an agent or representative to maintain such an action for and in behalf of all employees similarly situated."[19]

Nine years later, Congress passed the Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 87. The legislation was prompted by decisions of this Court including in an employee's statutory "workweek" the time spent travelling to a work station on the employer's premises and conducting preliminary activities.[20] In addition to extinguishing claims arising from those decisions, Congress made several modifications in the procedures through which FLSA rights could be enforced. Specifically, it abolished the "representative" action by a person who himself had no claim (thus permitting private FLSA actions to be initiated only by employees who asserted claims in their own right), added the requirement that an employee file a written consent in order to

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[19] Section 16(b) of the FLSA, 52 Stat. 1069, provided in pertinent part:

> Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated.

[20] *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-694 (1946); *Jewel Ridge Coal Corp.* v. *Local 6167, United Mine Workers*, 325 U.S. 161, 166 (1945); *Tennessee Coal, Iron & R.R.* v. *Muscoda Local No. 123*, 321 U.S. 590, 598-599 (1944). See *Universities Research Ass'n* v. *Coutu*, 450 U.S. 754, 781 (1981); *Steiner* v. *Mitchell*, 350 U.S. 247, 253 (1956).

join a collective action, provided a uniform statute of limitations, and made clear that the statute would run as to an individual employee's claim until he filed a complaint or a consent to become a party. Portal-to-Portal Act of 1947, ch. 52, §§ 5(a), 6-7, 61 Stat. 87-88.

As petitioner points out (Pet. Br. 20-22), the legislative history of the Portal-to-Portal Act reveals the concerns that underlay those modifications.[21] But it provides no support for the leap that lies at the core of petitioner's argument. The fact that Congress expressed some "disapprobation" of practices that had arisen since the passage of the 1938 Act and made some corresponding modifications to "provide relief for *employers*" (Pet. Br. 21-23) does not remotely suggest that it wished courts to take a grudging approach to the remedies it chose to preserve. To the contrary, Congress took care to reaffirm the availability of the collective action as a means of enforcing the Act. After noting that representative actions would be abolished, the relevant committee reports all stated that "[c]ollective actions brought by an employee or employees (a real party in interest) for and in behalf of himself or themselves and other employees similarly situated may continue to be brought in accordance with the existing provisions of the Act."[22] Senator Donnell,

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[21] The abolition of representative actions filed by persons who themselves had no claim was a response to dissatisfaction with actions filed by labor unions seeking large damage awards on behalf of their members. See S. Rep. No. 37, 80 Cong., 1st Sess. 12-25 (1947); S. Rep. No. 48, 80th Cong., 1st Sess. 12-25 (1947). The purpose of the provision for written consents, together with the new statute of limitations, was to give employers better notice of the scope of their potential liability in a collective action. See 93 Cong. Rec. 2182 (1947) (remarks of Senator Donnell).

At the same time, the requirement of consent codified what some courts had previously required in order to assure that employees were not bound by a judgment in violation of due process. See, *e.g.*, *Smith* v. *Stark Trucking, Inc.*, 53 F. Supp. 826, 828 (N.D. Ohio 1943); *Shain* v. *Armour & Co.*, 40 F. Supp. 488, 490 (W.D. Ky. 1941).

[22] H.R. Conf. Rep. No. 326, 80th Cong., 1st Sess. 13 (1947); S. Rep. No. 37, *supra*, at 48; S. Rep. No. 48, *supra*, at 49. But cf. H.R. Rep. No. 71, 80th Cong., 1st Sess. 4 (1947) (suggesting that the practice of filing collective actions seeking portal-to-portal liabilities and requesting discovery of the inden-

the chairman of the subcommittee that conducted the hearings on the legislation, drew a clear distinction between collective and representative actions and stressed that the proponents of the legislation had "no objection" to actions brought by employees on behalf of other employees.[23]

The legislative history confirms what is apparent on the face of the statute. Reacting to some perceived shortcomings in the remedies enacted in 1938, Congress made corresponding modifications in the remedial scheme. There was no indication, however, that Congress viewed those modifications as anything less than a complete solution to the problems it found, and the amendments expressed no disapproval of the remedies that remained. As the court below recognized, "[t]he continued authorization for bringing collective or quasi-class actions under the procedural provisions of the FLSA demonstrates Congress' lack of hostility to such actions, if nothing more. However, if a plaintiff could not contact and solicit the consents of other 'similarly situated' individuals, the congressionally sanctioned form of action would be meaningless." Pet. App. 16a.

In 1967, Congress passed the ADEA. The legislation was a "hybrid" that combined features of Title VII, the FLSA, and the National Labor Relations Act. See *Lorillard* v. *Pons*, 434 U.S. 575, 578 (1978). By incorporating Section 16(b) of the FLSA, Congress gave employees aggrieved by illegal age discrimination

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tity of employees involved constituted "a tremendous financial burden to the employer").

[23] After outlining the remedies provided by the Act as initially passed and positing hypothetical collective and representative actions brought on behalf of employees of the "X steel company" (the latter by "the district director of the labor union who might live 500 miles away and not be employed at all in the plant"), Senator Donnell continued (93 Cong. Rec. 2182 (1947)):

> In the first case, an employee, a man who is working for the X steel company, can sue for himself and other employees. We see no objection to that. But the second class of cases, namely, cases in which an outsider, perhaps someone who is desirous of stirring up litigation without being an employee at all, is permitted to be the plaintiff in the case, may result in very decidedly unwholesome champertous situations which we think should not be permitted under the law.

the right to initiate collective actions on behalf of other similarly situated employees.[24] However, the ADEA did not adopt all of the provisions of the Portal-to-Portal Act.[25] Thus, even if the history of the Portal-to-Portal Act militated against the judicial authority exercised here—and it does not—this selective incorporation underscores the inappropriateness of looking to that history for guidance.[26]

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[24] Each House of Congress initially considered a bill, patterned after Sections 10(c) and (e) of the National Labor Relations Act, 29 U.S.C. §§ 160(c), (e), that would not have granted a private right of action to aggrieved individuals. S. 830, 90th Cong., 1st Sess. (1967); H.R. 4221, 90th Cong., 1st Sess. (1967). However, Congress discarded that proposal and substituted legislation adopting some of the procedures of the FLSA, in order to obtain the benefits of private enforcement of the prohibition against age discrimination. See S. Rep. No. 723, 90th Cong., 1st Sess. 5 (1967); H.R. Rep. No. 805, 90th Cong., 1st Sess. 5 (1967). The ability of similarly situated employees to join in a single action to obtain relief from employment practices affecting them as a group was undoubtedly perceived as likely to advance the purpose of the Act to end arbitrary age discrimination. Cf. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975) ("It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices.' ").

[25] For instance, Section 7 of the Portal-to-Portal Act, which provided that an employee's FLSA action would not be deemed to have commenced for purposes of the statute of limitations until he filed a consent, was not incorporated. See Section 7(e)(1) of the ADEA, 29 U.S.C. 626(e)(1) ("Sections 255 and 259 of this title [6 and 10 of the Portal-to-Portal Act of 1947] shall apply to" ADEA actions). A number of courts have held, accordingly, that the filing of a collective action tolls the statute as to similarly situated employees who are not named plaintiffs. See *Levine* v. *Lane Bryant*, 700 F. Supp. 949, 951-954 (N.D. Ill. 1988); *Vivone* v. *Acme Markets*, 687 F. Supp. 168, 169 (E.D. Pa. 1988); *Franks* v. *Capital Cities Communications Inc.*, 48 Fair Empl. Prac. Cas. (BNA) 551, 552 (S.D.N.Y. 1983); see also *Morelock* v. *NCR Corp.*, 586 F.2d 1096, 1103 (6th Cir. 1978). But see *O'Connell* v. *Champion International Corp.*, 812 F.2d 393, 394 (8th Cir. 1987) (citing 29 U.S.C. 256(b) without discussion for the proposition that the statute of limitations is tolled when a written consent is filed).

[26] Nor does the fact that this Court adopted amendments to Rule 23 in 1966 imbue Congress's silence in the ADEA on the issue of notice with any additional meaning. See Pet. Br. 25-30. As noted above, that silence simply reflected the traditional legislative delegation to the courts of questions concerning the management of litigation, including the question whether courts should adopt procedures similar in some respects to those authorized by Rule 23 in collective actions under the ADEA or the FLSA.

We note that in its zeal to find significance in the amendment to Rule 23, petitioner seriously overstates the nature of Congress's role in that amendment. Congress did not "enact" the pre-1966 version of the Rule (Pet. Br. 25), nor, by merely allowing the amended rule to become effective in accordance with the Rules Enabling Act, did it specifically "address" or "authorize" the amendment (*id.* at 26-27).

The legislative history of the FLSA, the Portal-to-Portal Act, and the ADEA do not justify a cramped view of the courts' authority to supervise notice of collective actions under the ADEA. To the extent it is relevant at all, that history only confirms what is apparent on the face of the statutes themselves. Congress meant to give employees the right to bring collective actions, required individuals to file written consents to participate, and left the remaining procedural details to be resolved by reference to the evolving law governing procedure in the federal courts.

D. By Merely Supervising Notice of Collective Actions, Courts Do Not Engage in Any Improper Solicitation of Claims

As both lower courts recognized, courts must avoid communicating any approval of the merits of a claim or any encouragement of any of the alternatives available to an employee. Pet. App. 19a, 67a.[27] Nevertheless, a persistent theme of petitioner's brief is that any judicial role in the formulation or giving of notice of a collective action is indistinguishable from involvement in the solicitation of claims.[28]

[27] In this regard, we agree that it is not proper for a district court to conceive of its role as being "to aid ADEA class plaintiffs in filling their class with all of its possible members." Pet. App. 63a. Although the district court should not have framed the issue in those terms, its holding—"that it is permissible for a court to facilitate notice of an ADEA suit to absent class members in appropriate cases, so long as the court avoids communicating to absent class members any encouragement to join the suit or any approval of the suit on its merits"—was neutral.

[28] See, *e.g.*, Pet. Br. 12 & n.9 ("The role plaintiffs here propose for the judiciary would involve the courts in maximizing the solicitation and joinder

There are several flaws in that view. For reasons set forth above, court oversight of notice may serve entirely legitimate interests apart from the goal of encouraging joinder in an action. The fact that some plaintiffs may seek court authorization of notice as a means of increasing the number of employees participating in an action—or that such notice may lead to the filing of consents by employees who would not otherwise have filed them—does not suggest otherwise. It is not a departure from judicial neutrality to supervise the giving of notice of a collective action to advance the effective management of the case and to facilitate informed choices by employees on the exercise of their statutory rights.

Moreover, a court's authority over notice should not be determined on the basis of the questionable assumption that employees who come forward in response to that notice are not likely to advance claims that are "substantively strong," or the dubious contention that it would be more convenient to let sleeping dogs lie. See Pet. Br. 36-38.[29] As the district court observed, recoveries under the ADEA should not be "limited only to those victims who are already known to their 'champion,' * * * or who are fortunate enough to hear and heed 'the vagaries of rumor and gossip,' * * * or who are courageous

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of additional parties seeking money damages. * * * Thus court facilitated notice serves no proper judicial function and serves only to advance plaintiffs' strategic objectives.")

[29] Courts should not be deprived of all authority to supervise notice of ADEA actions on the assumption that age discrimination claims are unsuitable for class treatment. That assumption directly contradicts Congress's decision to authorize collective actions in which the claims of various employees would be joined. Moreover, ADEA cases may involve explicit age restrictions, which are particularly amenable to class treatment. Courts have approved ADEA collective actions challenging a variety of allegedly discriminatory employment practices. See, *e.g.*, *Mistretta* v. *Sandia Corp.*, 639 F.2d 588 (10th Cir. 1980) (collective action and consolidated government action challenging reduction in force); *Owens* v. *Bethlehem Mines Corp.*, 108 F.R.D. 207 (S.D. W. Va. 1985) (company-wide reduction in force); *Allen* v. *Marshall Field & Co.*, 93 F.R.D. 438 (N.D. Ill. 1982) (ADEA class action challenging forced retirement of management level employee).

enough to recognize the wrong done them and sue on their own." Pet. App. 69a.[30]

The only issue in this case is whether the courts have any authority to supervise notice to employees on whose behalf an action has been brought. As one means of enforcing the national policy against age discrimination, Congress created a remedy whose effectiveness depends on those employees' learning of the action and making an informed decision on whether to join it. The remedy was enacted against a background of broad judicial authority to regulate litigation pending on court dockets, and that authority includes the type of action in issue in this case.

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[30] Contrary to petitioner's contention, the claims of the absent class members are not necessarily weak. Individuals with small claims may not be aware of their rights, or may be discouraged from asserting their claims because they believe it is not worth the time and expense to bring an action, or because they have difficulty obtaining an attorney. Lipschultz, *The Class Action Suit Under the Age Discrmination in Employment Act: Current Status, Controversies, and Suggested Clarifications*, 32 Hastings L.J. 1377, 1391-1392 (1981). See also Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356, 397-398 (1967) (the "moral justification" for freezing out the "claims of people—especially small claims held by small people—who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step" is "questionable").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

DAVID L. SHAPIRO
Deputy Solicitor General

STEPHEN L. NIGHTINGALE
Assistant to the Solicitor General

CHARLES A. SHANOR
General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

VELLA M. FINK
Assistant General Counsel

GALE BARRON BLACK
Attorney

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